COPY

(2)

Supreme Court, U.S.
FILED

No. 01A855 011862 JUN 13 2002

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

JEANNE WOODFORD, Warden, *Petitioner,*

v.

ROBERT FREDERICK GARCEAU, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES SUPREME COURT

APPENDIX

BILL LOCKYER
Attorney General of the State of California
ROBERT R. ANDERSON
Chief Assistant Attorney General
JO GRAVES
Senior Assistant Attorney General
CLAYTON S. TANKA
Deputy Attorney General
JANIS SHANK McLEAN
Supervising Deputy Attorney General
Counsel of Record
1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-8610
Fax: (916) 324-2960
Counsel for Petitioner

197pgs

INDEX

	Page
Ninth Circuit Court of Appeals Opinion (No. 99-99022) (Filed December 26, 2001)	1-26
Ninth Circuit Court of Appeals Order Denying Rehearing (No. 99-99022) (Filed February 15, 2002)	27-28
Order Staying Issuance of Mandate Pending Filing of a Petition for Writ of Certiorari in the Supreme Court. (United States Court of Appeal, Ninth Circuit (No. 99-99022) (Filed February 25, 2002)	29
Memorandum and Order Denying Petition for Writ of Habeas Corpus and Denying Issuance of Certificate of Probable Cause (United States District Court, Eastern District of California No. CIV F-95-5363 OWW P) (Filed July 30, 1999)	30-101
California Supreme Court Opinion (No. S004776) (Filed November 18, 1993)	102-179
28 U.S.C. § 2241-2255	180-195

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT FREDERICK GARCEAU,
No. 99-99022
Petitioner-Appellant,
D.C. No.
v. CV F-95-5363
OWW
JEANNE WOODFORD, Acting Warden
of San Quentin State Prison, OPINION

Respondent-Appellee.

Appeal from the United States District Court
for the Eastern District of California
Oliver W. Wanger, District Judge, Presiding

Argued and Submitted
May 17, 2001--San Francisco, California

Filed December 26, 2001

Before: Diarmuid F. O'Scannlain, A. Wallace Tashima, and
Sidney R. Thomas, Circuit Judges.

Opinion by Judge Tashima;
Concurrence by Judge Thomas;
Partial Concurrence and Partial Dissent by
Judge O'Scannlain

SUMMARY

Criminal Law and Procedure/Due Process

The court of appeals reversed a judgment of the district court. The court held that an "other crimes" jury instruction that allows the jury to use the evidence of a defendant's other crimes to establish his criminal propensity for the charged crime violates due process, when the balance of the prosecution's case against the defendant is not strong; the other crime is the same crime for which he is on trial; the prosecutor relies heavily on the other crimes evidence; and the other crimes evidence is emotionally charged.

Appellant Robert Garceau was convicted in Kern County, California, of first degree murder for the 1984 stabbing deaths of his girlfriend, Maureen Bautista, and her son, Telesforo Bautista. Their bodies were not found until six months later, in a bedroom dresser buried under a layer of concrete in the backyard of one of Garceau's drug partners, Greg Rambo. There was no physical evidence linking Garceau to the murders. The state's case against him consisted largely of the testimony of Garceau's drug partners, who testified that Garceau had confessed to them that he had killed the Bautistas. They further testified that Garceau murdered the Bautistas, he returned to the scene of the crime with two of his drug partners and stuffed the Bautistas' bodies into a bedroom dresser. Garceau and Greg Rambo then transported the dresser to Rambo's house. They buried the dresser under a layer of concrete in Rambo's backyard.

A few months later, Greg Rambo was shot to death. Prior to his trial for the Bautista murders, Garceau was charged with and convicted of Greg Rambo's murder and sentenced to 33 years to life imprisonment. At Garceau's trial for the Buatista murders, several of his drug partners testified that he had told them that he had killed Rambo as well. Virtually all of the prosecution's witnesses had some connection to the murder of the Bautistas or some other self-interested reason for testifying against Garceau. Garceau's defense at trial was that one or more of the drug partners killed the Bautistas. Garceau objected to the trial court's instruction that evidence of other crimes committed by Garceau could be used to establish his criminal propensity for the charged crime, including evidence that he manufactured illegal drugs and testimonial evidence that, several months after he allegedly murdered the Bautistas, he murdered Greg Rambo. The jury sentenced Garceau to death.

The California Supreme Court affirmed the conviction and sentence

and denied his state habeas petition on the merits. The district court denied Garceau's federal habeas petition, dismissing his claim that the other crimes jury instruction violated the Due Process Clause.

Garceau appealed his conviction and sentence.

[1] It is not a violation of due process to admit other crimes evidence, for purposes other than to show conduct in conformity therewith, when the jury is given a limiting instruction that it should not consider the prior conviction as any evidence of the defendant's guilt on the charge on which he was being tried. **[2]** The admission of other crimes evidence violates due process when: (1) the balance of the prosecution's case against the defendant was solely circumstantial; (2) the other crimes evidence, which involved the defendant's past use of knives, was similar to the stabbing for which he was on trial; (3) the prosecutor relied on the other crimes evidence at several points during the trial; and (4) the other crimes evidence was emotionally charged.

[3] The application of these factors led to the conclusion that Garceau's other crimes jury instruction violated due process. First, the state's case, absent the impermissible propensity inference, was not a strong one. Second, the impermissible propensity inference was very strong. The other crime, Rambo's murder, was precisely the same crime for which Garceau was on trial. Third, the prosecutor relied fairly heavily on the Rambo murder in urging the jury to draw the propensity inference. Fourth, the other crime was explained in graphic detail and likely emotionally affected the jury.

[4] Drawing propensity inferences from other acts evidence of character is impermissible under an historically grounded rule of Anglo-American jurisprudence. When no other inference is possible, such evidence must be excluded. The harm of drawing the propensity inference is no less stark when it is possible for the jury additionally to draw other inferences. The only way to mitigate this harm, short of excluding the evidence altogether, is to give the jury a limiting instruction. Even worse than failing to give such an instruction is what Garceau's trial court did: affirmatively inviting the jury to draw the propensity inference. Accordingly, it had to be concluded that the other crimes jury instruction rendered Garceau's trial so fundamentally unfair as to constitute a violation of the Due Process Clause.

[5] In order to determine whether the jury instruction constituted harmless error, the quality, significance, and pervasiveness of the evidence related to the propensity instruction had to be examined. **[6]** A review of the record led to the conclusion that the instruction did not constitute harmless error. It was highly probable that the court's instruction to the jury to consider Garceau's other crimes to judge his conduct had a substantial and injurious effect on determining the jury's verdict. **[7]** The district court erred in denying Garceau's habeas petition' its judgment had to be reversed and the case remanded with directions to issue the writ, unless the state would grant Garceau a new trial within a reasonable period of time to be set by the district court.

Judge Thomas concurred, writing separately to note that if the court were not reversing on the grounds stated in the majority opinion, it would necessarily have to reverse and remand with instructions to the district court to hold an evidentiary hearing on Garceau's claim of ineffective assistance of counsel during the sentencing phase.

Judge O'Scannlain concurred in part and dissented in part, writing that the ineffective assistance claim warranted reversal, but, even if the jury instruction violated Garceau's due process rights, any error was harmless.

COUNSEL

Lynne S. Coffin, San Francisco, California, and Denise Kendall, Mill Valley, California, for the petitioner-appellant.

Clayton S. Tanaka, Deputy Attorney General of California, Sacramento, California, for the respondent-appellee.

OPINION

TASHIMA, Circuit Judge:

Robert Garceau was convicted of a double homicide in California state court and sentenced to death. The California Supreme Court affirmed his conviction and sentence, *People v. Garceau*, 862 P.2d 664

(Cal. 1993), cert. denied, 513 U.S. 848 (1994), and denied his state habeas petition on the merits. He then filed a habeas petition in federal district court, raising 28 separate grounds for relief. In due course, he moved the district court for an evidentiary hearing on several of these claims. The district court denied his motion for an evidentiary hearing and later denied his petition. Garceau appeals the district court's denial of an evidentiary hearing on four of his claims, as well as the district court's denial of his petition on three of his claims. We have jurisdiction over this timely appeal pursuant to 28 U.S.C. § 2253, and we reverse.

I. FACTUAL BACKGROUND AND PRIOR PROCEEDINGS

Robert Garceau was convicted in Kern County, California, of first degree murder for the September 1984 stabbing deaths of his girlfriend, Maureen Bautista, and her 14-year-old son, Telesforo Bautista. Their bodies were not found until six months later, in a bedroom dresser buried under a layer of concrete in the backyard of one of Garceau's drug partners, Greg Rambo. There was no physical evidence linking Garceau to the murders. The State's case against him consisted largely of the testimony of several persons with whom Garceau manufactured methamphetamine. These drug partners testified that Garceau had confessed to them that he had killed the Bautistas because he was worried that they would reveal his drug activities to law enforcement authorities. They further testified that after Garceau murdered the Bautistas, he returned to the scene of the crime with two of his drug partners and stuffed the Bautistas' bodies into a bedroom dresser. Garceau and Greg Rambo then transported the dresser to Rambo's house. They buried the dresser under a layer of concrete in Rambo's backyard.

A few months later, in February 1985, Greg Rambo was shot to death. Prior to his trial for the Bautista murders, Garceau was charged with and convicted of Greg Rambo's murder and sentenced to 33 years to life imprisonment. At Garceau's trial for the Bautista murders, several of his drug partners testified that he had told them that he had killed Rambo as well. After Rambo's death, his wife, Susan, led the police to the bodies of the Bautistas buried in her backyard.

Virtually every single one of the prosecution's witnesses had some connection to the murder of the Bautistas or some other self-interested

reason for testifying against Garceau. Susan Rambo assisted in digging the hole in her backyard in which the dresser containing the Bautistas was buried for six months. She testified under a grant of immunity. Larry Tom Whittington helped stuff the Bautistas' bodies into the dresser at the crime scene. Patricia Shepard was Whittington's girlfriend; she and Whittington cleaned up the bloodstains at the crime scene the day after the bodies were removed. Harlyn Codd helped Garceau dispose of Rambo's body. The only witness that does not appear to have had a hand in any of the three murders was Wayne James. He was, however, involved in illegal drug manufacturing with Garceau, and he did not come forward to the police until a few days before he testified. Garceau argues that weapons charges against James were dropped after he agreed to testify. Garceau's defense at trial was that one or more of these drug partners killed the Bautistas.

At the sentencing phase, the prosecution presented evidence of Garceau's prior convictions for burglary and weapons charges. In addition, the jury heard evidence that Garceau possessed high-powered firearms on many other occasions, and that he was involved in a kidnaping. In mitigation, Garceau presented evidence of his history in prison, his upbringing, his character, and his caring relationships with people. The jury fixed the penalty at death.

Garceau appealed his conviction and sentence to the California Supreme Court, which affirmed the conviction and sentence. It also denied his state habeas petition on the merits. Garceau requested the appointment of counsel to pursue his federal habeas remedies and a stay of execution in federal district court on May 12, 1995. Counsel was appointed on June 26, 1995, and Garceau filed his federal habeas petition on July 2, 1996.[1/]

---

1. Although Garceau's petition for the writ of habeas corpus was filed after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, the AEDPA does not generally apply to his petition. This is the case because the AEDPA does not apply to petitions that were "pending" as of the effective date of the AEDPA, *Calderon v. United States Dist. Court (Kelly)*, 163 F.3d 530, 539 (9th Cir. 1998) (en banc), cert. denied, 119 S. Ct. 1377 (1999), and Garceau's petition is considered "pending" as of May 12, 1995, the date he requested both that federal habeas counsel be appointed and that his execution be stayed, *id.* at 540.

The district court eventually dismissed two of Garceau's 28 habeas claims for failure to exhaust them in state court proceedings. Garceau next filed a motion for an evidentiary hearing on several of his claims, which was denied. Ultimately, the district court denied his habeas petition, as well as the issuance of a certificate of probable cause. Garceau filed a notice of appeal from the final judgment on August 26, 1999, and we issued a certificate of probable cause on January 21, 2000.[2/]

---

2. The provisions of the AEDPA regarding the issuance of a certificate of appealability (COA) as a predicate to review in the court of appeals apply to all cases in which the notice of appeal was filed after the AEDPA's effective date, April 24, 1996. *See Slack v. McDaniel*, 529 U.S. 473, 482 (2000). Garceau filed his notice of appeal after that date. In these circumstances, we treat Garceau's notice of appeal as an application for a COA. *See Whelchel v. Washington*, 232 F.3d 1197, 1202 n.1 (9th Cir. 2000). Under the AEDPA, a court may issue a COA when"the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To meet this standard, the petitioner "must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." *Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000) (*quoting Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983) (internal quotation marks omitted) (emendation in the original)). Because it is clear that Garceau meets this standard, we grant the COA and exercise jurisdiction over all issues presented in

II. DISCUSSION

Garceau contends that the district court erred by: (1) denying his request for an evidentiary hearing on his ineffective assistance of counsel and equal protection claims; (2) dismissing his claim that the State used its peremptory challenges in a racially discriminatory manner; (3) dismissing his claim that the "other crimes" jury instruction violated the Due Process Clause; and (4) dismissing his claim that the trial court's failure to give the jury a "voluntary intoxication " instruction violated the Due Process Clause. Because we conclude that habeas relief is warranted based on the "other crimes" jury instruction, we find it unnecessary to address the remaining issues.

A. Standard of Review

We review de novo the district court's decision to deny a petition for a writ of habeas corpus. *Bribiesca v. Galaza*, 215 F.3d 1015, 1018 (9th Cir. 2000).

B. The "Other Crimes" Jury Instruction

During Garceau's trial, the State introduced two types of evidence of other crimes committed by Garceau: evidence that he manufactured illegal drugs and testimonial evidence that, several months after he allegedly murdered the Bautistas, he murdered Greg Rambo (a crime for which he had already been convicted). Although Garceau did not object to this evidence (in fact, he had planned to introduce it himself), he did object to the trial court's instruction to the jury regarding this evidence, which read as follows:

> Evidence has been introduced for the purpose of showing that the defendant committed other crimes other than that for which he is on trial.

---

this appeal. *See Whelchel*, 232 F.3d at 1202 n.1.

> Such evidence, if believed, may be considered by you for any purpose, including but not limited to any of the following:
>
> *His character or any trait of his character; His conduct on a specific occasion . . . .*

Garceau, 862 P.2d at 690 n.17 (emphasis added). Garceau asked instead for a modified version of the standard California (CALJIC) instruction on other crimes evidence, which would have instructed the jury that such evidence"may not be considered by you to prove . . . bad character or . . . disposition to commit crimes." *Id.* at 690 n.18. His request was rejected by the court.

On direct appeal, Garceau argued that the trial court's instruction violated California Evidence Code § 1101, which reads:

> (a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, *evidence of a person's character or a trait of his or her character* (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) *is inadmissible when offered to prove his or her conduct on a specified occasion.*
>
> (b) *Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact* (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) *other than his or her disposition to commit such an act.*

Cal. Evid. Code § 1101(a), (b) (2001) (emphasis added). The California Supreme Court agreed, holding that the instruction "impermissibly invited the jury to consider certain evidence (e.g., that defendant killed Rambo) for the purpose of establishing defendant's propensity to commit murder. " *Garceau*, 862 P.2d at 691. The

California Supreme Court concluded, however, that the error was harmless because there was "overwhelming evidence" of Garceau's guilt. *Id.* at 691-92.

Garceau argues that, not only was the instruction contrary to California law, but it violated the Due Process Clause by permitting the jury to use the evidence of his other crimes to establish his criminal propensity, i.e., the likelihood that he committed the charged crimes.

[1] The Supreme Court has held that it is not a violation of due process to admit other crimes evidence, for purposes other than to show conduct in conformity therewith, where the jury is given a limiting instruction "that it should not consider the prior conviction as any evidence of the defendant's guilt on the charge on which he was being tried." *Spencer v. Texas*, 385 U.S. 554, 558, 563-64 (1967); *accord Estelle v. McGuire*, 502 U.S. 62, 74-75 (1991). The defendant in Spencer was charged with murder and the trial court admitted into evidence the fact that the defendant had previously been convicted of murder. *Spencer*, 385 U.S. at 557. Although the Supreme Court did not explicitly say that the limiting instruction was necessary to the constitutional admission of the other crimes evidence, it relied on the existence of the limiting instruction in holding that there was no due process violation. *Id.* at 562. ("This type of prejudicial effect is acknowledged to inhere in criminal practice, but it is justified on the grounds that . . . the jury is expected to follow instructions in limiting this evidence to its proper function . . . .").

This reliance has led two circuits to hold that the admission of other crimes evidence, for purposes other than to show conduct in conformity therewith, violates due process in the absence of a limiting instruction. *See Panzavecchia v. Wainwright*, 658 F.2d 337, 341 (5th Cir. 1981) (holding that it violated due process for the jury to hear "repeated references to the defendant's criminal past without any limiting instruction to relate this evidence only to the firearm violation and to disregard it altogether in considering the murder count"); *Murray v. Superintendent, Ky. State Penitentiary*, 651 F.2d 451, 453 (6th Cir. 1981) (noting that the Sixth Circuit has held that "[t]he logical converse of [Spencer] is that it is unfair and violative of due process if evidence of other crimes is admitted without a limiting instruction").

Nonetheless, the Supreme Court has never expressly held that it

violates due process to admit other crimes evidence for the purpose of showing conduct in conformity therewith, or that it violates due process to admit other crimes evidence for other purposes without an instruction limiting the jury's consideration of the evidence to such purposes. Indeed, the Supreme Court has expressly declined to answer these questions, *see Estelle*, 502 U.S. at 75 n.5 ("Because we need not reach the issue, we express no opinion on whether a state law would violate the Due Process Clause if it permitted the use of `prior crimes' evidence to show propensity to commit a charged crime.").[3]

The Ninth Circuit has addressed the first of the issues left open by the Supreme Court by holding that the admission of other crimes evidence, where there were no permissible inferences the jury could have drawn from the evidence (in other words, no inference other than conduct in conformity therewith), violates due process. *See McKinney v. Rees*, 993 F.2d 1378, 1384 (9th Cir. 1993); *Jammal v. Van De Kamp*, 926 F.2d 918, 920 (9th Cir. 1991). In *Jammal* and *McKinney*, however, we did not have before us a case, like this one, where there is a permissible inference that the jury could draw from the other crimes evidence, but where the jury was expressly invited to draw the additional inference of criminal propensity.[4]

---

3. In his partial dissent in Spencer, Chief Justice Warren argued that "[w]hile this Court has never held that the use of prior convictions to show nothing more than a disposition to commit crime would violate the Due Process Clause of the Fourteenth Amendment, our decisions . . . suggest that evidence of prior crimes introduced for no purpose other than to show criminal disposition would violate the Due Process Clause." 385 U.S. at 572-74. This comports with the Advisory Committee's analysis of Fed. R. Evid. 404, that the general rule against using other crimes evidence to make inferences about character or propensity in a criminal case "is so deeply imbedded in our jurisprudence as to assume almost constitutional proportions." Fed. R. Evid. 404(a) advisory committee note (1972).

4. In Jammal, there was no limiting instruction, but the

[2] The question we must answer, therefore, is whether the express propensity instruction in this case "by itself so infected the entire trial that the resulting conviction violates due process." *Estelle*, 502 U.S. at 72 (internal quotation marks and citations omitted). The analysis underlying *McKinney* supports the conclusion that the jury instruction at issue so offended fundamental conceptions of justice and fair play as to rise to the level of a constitutional violation. Specifically, in McKinney, we held that the admission of other crimes evidence violated due process where: (1) the balance of the prosecution's case against the defendant was "solely circumstantial;" (2) the other crimes evidence, which involved the defendant's past use of knives, was similar to the stabbing for which he was on trial; (3) the prosecutor relied on the other crimes evidence at several points during the trial; and (4) the other crimes evidence was "emotionally charged." *McKinney*, 993 F.2d at 1381-82, 1385-86.

[3]Application of the *McKinney* factors to this case similarly leads to the conclusion that the other crimes jury instruction violated due process. First, the State's case, absent the impermissible propensity inference, was not a strong one. There was no physical evidence connecting Garceau to the alleged murders. The State's case consisted entirely of testimony by Garceau's drug partners that Garceau had told them that he had committed the murders and circumstantial evidence. Garceau argued to the jury, not implausibly, that this testimony was tainted by self-interest. Second, the impermissible propensity inference in this case was very strong. The other crime, Rambo's murder, was precisely the same crime for which Garceau was on trial. In addition, the proximity between Rambo's murder and the murders for which Garceau was on trial was a very close five months. Third, the prosecutor relied fairly heavily on the Rambo murder in urging the jury to draw the propensity inference.[5] Fourth, the other crime in this case was explained

---

defendant was "barred from complaining" about its absence because he did not request one. 926 F.2d at 920 n.2. Garceau asked for a limiting instruction.

5. The prosecutor referred to Rambo's murder on dozens of pages of the transcript of his closing argument. He began his closing argument by saying that he intended to show that "the defendant [was] the killer of not only Maureen Bautista and Telesforo Bautista but Greg Rambo." State Ct. Rep. Tr. at 3658. He tied the murders together at several points in his closing argument, perhaps most extensively by using several pages of transcript to make a point-by-point comparison of the three murders, arguing that "[t]here are certain systems at least of categories that connect Maureen and Telesforo's murder with Greg Rambo's murder." State Ct. Rep. Tr. at 3861-65. He concluded: "Garceau is the common denominator. Garceau is the [illegible]ho committed the murders." State Ct. Rep. Tr. at 3865.

in graphic detail and very likely emotionally affected the jury.

[4] Moreover, *McKinney* based its conclusion regarding the Due Process Clause on the fact that "drawing propensity inferences from `other acts' evidence of character is impermissible under an historically grounded rule of Anglo-American jurisprudence . . . ." *Id.* at 1384. The court held that when no other inference is possible, such evidence must be excluded. *Id.* The harm of "drawing the propensity inference" is no less stark, however, where it is possible for the jury additionally to draw other inferences. The only way to mitigate this harm, short of excluding the evidence altogether (which *Spencer* and *Estelle* held is not required by due process) is to give the jury a limiting instruction. Even worse than failing to give such an instruction is what the trial court did in this case: affirmatively inviting the jury to draw the propensity inference. Accordingly, we conclude that the other crimes jury instruction rendered Garceau's trial so fundamentally unfair as to constitute a violation of the Due Process Clause.

We must next determine whether the due process violation constituted harmless error. The California Supreme Court held the erroneous jury instruction in this case was harmless under the "harmless beyond a reasonable doubt " standard of *Chapman v. California*, 386 U.S. 18 (1967). *Garceau*, 862 P.2d at 691-92. Although that is the correct standard for direct review, habeas review is more deferential. *See*

Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) ("The imbalance of the costs and benefits of applying the Chapman harmless error standard on collateral review counsels in favor of applying a less onerous standard on habeas review of constitutional error."). On habeas review, error is harmless unless it " `had substantial and injurious effect or influence in determining the jury's verdict.' " *Id.* (*quoting Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). That is, the error is harmless unless Garceau can establish "actual prejudice." *Brecht*, 507 U.S. at 637 (internal quotation marks and citation omitted).

The district court accorded the California Supreme Court's conclusion that the error in this case was harmless beyond a reasonable doubt a "presumption of correctness " because it was a "state court finding[ ]." As Garceau correctly points out, however, "[w]hether the constitutional error was harmless is not a factual determination entitled to the statutory presumption of correctness under 28 U.S.C. § 2254(d)." *Lawson v. Borg*, 60 F.3d 608, 612 (9th Cir. 1995). Thus, we consider the harmless error question de novo.

[5] The court in *McKinney* stated that "[t]he analysis that leads us to conclude that the erroneous admission of propensity evidence rendered [defendant's] trial fundamentally unfair in violation of the Due Process Clause is similar to the analysis we must undertake to determine whether his conviction must be set aside on collateral review." *McKinney*, 993 F.2d at 1385. The court proceeded to conduct the harmless error analysis by evaluating the same factors it had used to determine that a constitutional violation had occurred. Id. at 1386. Following *McKinney*, in order to determine whether the jury instruction in this case constituted harmless error, we therefore examine the quality, significance, and pervasiveness of the evidence related to the propensity instruction.

[6] As discussed above, a review of the record leads to the conclusion that the instruction did not constitute harmless error. The evidence against Garceau was not weighty; in fact, there was no direct physical evidence implicating Garceau and the conviction turned on the testimony of potentially biased witnesses. In addition, the other crimes evidence was used pervasively throughout the trial. Indeed, the prosecutor made significant reference to the Rambo murder during closing argument. Moreover, one of the other crimes in

question--Rambo's murder--was identical to the crime for which Garceau was on trial, heightening its emotional impact and evidentiary significance.[6] In light of these facts, it was highly probable that the court's instruction to the jury to consider Garceau's other crimes to judge his conduct had a substantial and injurious effect on determining the jury's verdict. *See id.*

The State argues, and the California Supreme Court concluded, that the balance of the State's case against Garceau was "overwhelming." This argument is based largely on the fact that several people testified in detail that Garceau confessed to them that he had committed the murders. It is true that evidence of a confession carries significant weight on harmless error review, at least when the defendant has confessed to the police. *See, e.g., Tucker v. Johnson*, 242 F.3d 617, 629 (5th Cir.) (holding that admission of other crimes evidence was harmless in light of defendant's confession to police and overwhelming evidence of guilt), cert. denied, 112 S. Ct. 18 (2001). The confessions introduced in this case, however, were not made to the police, but assertedly to drug partners who arguably had reasons to lie. This weakens considerably the evidentiary weight of the confessions and, as a result, significantly undermines the State's assertion that the weight of the evidence of guilt was overwhelming. When viewed in the context of the entirely circumstantial and self-interested nature of the evidence against Garceau, the fact that the jury was instructed to infer criminal propensity from the other crimes testimony clearly prejudiced Garceau's case. We conclude, therefore, that the admittedly unconstitutional jury instruction was not harmless and that the writ of habeas corpus should issue.

III. CONCLUSION

---

6. Nor was the other crimes evidence in this case "cumulative" of properly admitted evidence. *See Brecht v. Abrahamson* , 507 U.S. 619, 639 (1993); see also *Laboa v. Calderon*, 224 F.3d 972, 978 (9th Cir. 2000) (holding improperly admitted confession was harmless because it "added nothing to the evidence").

[7] For the foregoing reasons, we conclude that the district court erred in denying Garceau's habeas petition on the ground that the "other crimes" jury instruction, albeit erroneous, was harmless error. Because Garceau's trial and conviction were infected with constitutional error which had a substantial and harmful effect on the jury's verdict, we reverse the judgment of the district court denying Garceau's petition for a writ of habeas corpus. We remand the case to the district court with directions to issue the writ, unless the State grants Garceau a new trial within a reasonable period of time to be set by the district court.

REVERSED and REMANDED.

THOMAS, Circuit Judge, concurring:

I concur in Judge Tashima's opinion. I write separately to note that, if we were not reversing on the grounds stated in the majority opinion, we would necessarily have to reverse and remand with instructions to the district court to hold an evidentiary hearing on Garceau's claim of ineffective assistance of counsel during the sentencing phase. Indeed, the warden conceded as much during oral argument of this case.

We review the district court's decision to deny an evidentiary hearing for an abuse of discretion. *Lawson v. Borg*, 60 F.3d 608, 611 (9th Cir. 1995). In this case, the district court erred in denying Garceau's request for an evidentiary hearing concerning his claim of ineffective assistance of counsel at the penalty phase.

"To obtain an evidentiary hearing on an ineffective assistance of counsel claim, a habeas petitioner must establish that (1) his allegations, if proven, would constitute a colorable claim, thereby entitling him to relief and (2) the state court trier of fact has not, after a full and fair hearing, reliably found the relevant facts." *Correll v. Stewart*, 137 F.3d 1404, 1411 (9th Cir. 1998). "In addition, . . . if the petitioner has failed to develop material facts in state court proceedings, he or she must demonstrate [1] adequate cause for his or her failure and [2] actual prejudice resulting from that failure." *Id.*

Garceau did not develop the facts supporting his ineffective assistance of counsel claims in state court. However, he has shown both

cause and prejudice justifying his failure.

A proper request for an evidentiary hearing in state court satisfies the "cause" requirement.

> When a state court denies an evidentiary hearing on a colorable ineffective assistance of counsel claim after proper request, a habeas petitioner has fulfilled the [*Keeney v.*]*Tamayo-Reyes*[, 504 U.S. 1 (1992),] "cause" requirement. Simply put, the state cannot successfully oppose a petitioner's request for a state court evidentiary hearing, then argue in federal habeas proceedings that the petitioner should be faulted for not succeeding.

Correll, 137 F.3d at 1413. Therefore, Garceau has satisfied the "cause" requirement by requesting a state evidentiary hearing on these issues. *See id.*

Because the *Tamayo-Reyes* prejudice prong is coextensive with the ineffective assistance of counsel prejudice prong under *Strickland v. Washington*, 466 U.S. 668 (1984), Garceau will have satisfied the prejudice prong under *Tamayo-Reyes* if he establishes a colorable ineffective assistance of counsel claim. *See Correll*, 137 F.3d at 1414.

The parties do not dispute that Garceau did not receive a state evidentiary hearing on these issues; therefore, a state court has not "reliably found the relevant facts, " *see id.* at 1411, and he will be entitled to an evidentiary hearing if he establishes a colorable claim.

"To establish a colorable claim of ineffective assistance of counsel, [petitioner] must demonstrate [1] that his counsel's performance at trial was deficient, and [2] that the deficient performance prejudiced his defense." *Id.* (*citing Strickland*, 466 U.S. at 687).

In this case, Garceau's counsel performed deficiently in preparing for and conducting Garceau's sentencing hearing. Counsel failed to investigate mitigating evidence relating to drug addiction and post-traumatic stress disorder ("PTSD"). Counsel also failed to investigate and rebut aggravating evidence regarding Garceau's participation in an alleged kidnapping.

"[W]here counsel is on notice that his client may be mentally impaired, counsel's failure to investigate his client's mental condition as

a mitigating factor in a penalty phase hearing, without a supporting strategic reason, constitutes deficient performance." *Hendricks v. Calderon* , 70 F.3d 1032, 1043 (9th Cir. 1995).

Counsel testified that he knew of Garceau's cocaine use and that he "was aware that cocaine use caused significant alternations in mental functioning and behavior, including that cocaine was widely recognized to cause psychosis as a result of chronic use." Nonetheless, he did not investigate the extent of Garceau's use, nor did he question the witnesses about Garceau's use or behavioral changes although even the prosecution's witnesses described Garceau's paranoid and delusional behavior. Furthermore, he hired an expert who could not document or diagnose the impact of chronic cocaine dependence and was not a psychopharmacologist. No strategic reason supported counsel's failure to investigate Garceau's drug addiction. *See id.*

Similarly, counsel failed to investigate or present evidence of PTSD. Although counsel stated that he was not aware that Garceau suffered from PTSD, he did know that Garceau served in Vietnam and abused heavy amounts of cocaine. Dr. Craig W. Haney, a psychology professor and an attorney, declared that at the time of the arrest and trial"it was common knowledge among virtually all mental health professionals and most capital attorneys with whom [he] was familiar that such experiences [as combat service in Vietnam] could produce long lasting psychological problems of the sort [Garceau] was experiencing and, also, that many persons suffering from these psychological problems used alcohol and illicit drugs in an effort to 'self-medicate' and blunt the pain and mask the emotional and behavioral consequences of the post-traumatic stress they were experiencing." Given the combat service, the drug use, the violence of the attacks, and the statements by his drug partners about paranoia and delusional behavior, counsel should have known to investigate PTSD as a possible mitigating factor. The failure to do so falls "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690.

The decision to not present mitigating evidence at a capital sentencing hearing "should be the product of a reasoned choice. Counsel has 'a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.' " *Correll*, 137

F.3d at 1412 (*quoting Strickland*, 466 U.S. at 691). In this case, counsel did not make a reasoned choice; he simply failed to investigate potentially mitigating evidence. *See id.*

Additionally, counsel performed "outside the wide range of professionally competent assistance," *Strickland*, 466 U.S. at 690, in utterly failing to investigate and rebut the aggravating evidence of Garceau's involvement in an alleged kidnapping. The prosecution presented considerable evidence during the sentencing hearing about this event. Garceau was initially charged as the driver in a kidnapping; however, the charges were dropped after the defense eattorney produced a witness who claimed that the alleged victim got into the truck voluntarily. Counsel in this case did not contact the prior attorney, did not interview any of the prosecution's witnesses, and did not attempt to find other percipient witnesses. In fact, one of the witnesses, the co-defendant in the kidnapping, even contacted counsel, but counsel refused to speak with him and just told him to arrive when he had been subpoenaed. During the sentencing hearing, counsel did not even bother to present evidence that the charges had been dismissed. Counsel's utter failure to investigate this aggravating evidence constitutes constitutionally deficient performance. *See Correll*, 137 F.3d at 1412-13.

Counsel's deficient performance also prejudiced Garceau. "To establish the prejudice prong of the *Strickland* standard, '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Hendricks*, 70 F.3d at 1036 (alteration in original) (*quoting Strickland*, 466 U.S. at 694). Failing to reasonably investigate potentially mitigating circumstances without a reasonable tactical explanation constitutes prejudice. *Correll*, 137 F.3d at 1413 ("[A]bsent any reasonable investigation into potentially mitigating circumstances and any reasonable tactical explanation, we must conclude [petitioner] has made a colorable claim of ineffective assistance of counsel at his capital sentencing.").

Counsel put on no expert testimony at all during the penalty phase.[1/]

---

1. In fact, counsel relied exclusively on the testimony of

The jury learned of Garceau's drug use through the prosecution witnesses, but counsel failed to put Garceau's drug use, social history, and Vietnam experience before the jury in a way that could explain his addiction and his behavior. In failing to do so, his performance prejudiced Garceau. *See Caro v. Calderon*, 165 F.3d 1223, 1227-28 (9th Cir. 1999); *see also Wallace v. Stewart*, 184 F.3d 1112, 1116 (9th Cir. 1999) ("Does an attorney have a professional responsibility to investigate and bring to the attention of mental heath experts who are examining his client, facts that the experts do not request? The answer, at least at the sentencing phase of a capital case, is yes."), cert. denied, 528 U.S. 1105 (2000).

Furthermore, the prosecution focused intently on the alleged kidnapping during the sentencing hearing. In closing, the prosecutor argued a trend of escalating violence that culminated in the three murders: "consider . . . whether this defendant is a man who has committed isolated acts of criminal conduct or whether this offender has rather developed a pattern of criminal conduct that began with the burglary and ultimately exploded into what I'm about to tell you is three murders." State Ct. Rep. Tr. of Sentencing Hr'g at 172. The kidnapping was an essential "first outward manifestation of violence toward another person" in this argument. State Ct. Rep. Tr. of Sentencing Hr'g at 173. Because of the kidnapping's pivotal role in the prosecution's argument, counsel's utter failure to investigate and rebut the prosecution's characterization of the incident as a crime of violence, at least by mentioning that the charges had been dismissed because a witness claimed that the alleged victim voluntarily accompanied the defendants, is "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

Garceau has established a colorable claim of ineffective assistance of counsel during his sentencing hearing. He has also demonstrated cause and prejudice, see Tamayo-Reyes, 504 U.S. at 6, for his failure to develop related facts in state court. Therefore, the district court erred in

---

two family members and the cross-examination of the prosecution's witnesses--most of whom testified about the alleged kidnapping.

denying his request for an evidentiary hearing on these issues. *See Correll*, 137 F.3d at 1412.

O'SCANNLAIN, Circuit Judge, concurring in part and dissenting in part:

I agree with Judge Thomas that we must "reverse and remand with instructions to the district court to hold an evidentiary hearing on Garceau's claim of ineffective assistance of counsel during the sentencing phase"; indeed, even "the warden conceded as much during oral argument of this case." *Supra*, Concurrence at 17261 (Thomas, J., concurring). But the majority goes further, reversing and remanding with instructions to grant Garceau a writ of habeas corpus (unless California grants him a new trial) based on the"other crimes" jury instruction. Because I believe that even if the instruction might have violated Garceau's due process rights any error was harmless under the deferential standard of *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993), I respectfully dissent.

I

The majority forthrightly admits that "the Supreme Court has never expressly held that . . . it violates due process to admit other crimes evidence for other purposes without an instruction limiting the jury's consideration of the evidence to such purposes." *Supra*, Maj. Op. at 17256. Nonetheless, the majority extends this court's precedents to hold that the "other crimes" instruction given in this case, which explicitly allowed the jury to use evidence of Garceau's other crimes as propensity evidence, "so offended fundamental conceptions of justice and fair play as to rise to the level of a constitutional violation," *id.* at 17257.[1]

---

1. Of course, it is not clear that the majority could have reached this conclusion had it been forced to grapple with *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion). The Supreme Court has explained that in the usual federal habeas case, "[t]he application of *Teague* is a threshold question . . . ."

Goeke v. Branch, 514 U.S. 115, 117 (1995) (per curiam). *Teague*, of course, bars a federal court considering a pre-AEDPA habeas petition from granting the petition where the vindicating a petitioner's claim would create a "new rule." *Id.* at 310. Certainly, given that neither the Supreme Court nor this court has yet addressed the question that today's opinion answers, the state has at the very least a colorable argument that the majority today announces a "new rule," on which it cannot grant Garceau relief. *See O'Dell v. Netherland* , 521 U.S. 151, 164 (1997) (stating that a new rule is one that "a reasonable jurist . . . would not have felt compelled to adopt") (emphasis added). Alas, the state did not raise *Teague* in its briefs before this court. And I recognize that we have discretion to consider *Teague* waived if it is not raised in the briefing. *See, e.g., United States v. Navarro*, 160 F.3d 1254, 1256 (9th Cir. 1998) ("*Teague* can be waived . . . .") (*citing Goeke*, 514 U.S. at 116-18). But given the majority's candid admission that the new rule it announces today is not compelled by any of our precedents, I would hesitate to forego a *Teague* analysis if the state had only implicitly waived *Teague* by failing to raise it in his briefs. *See, e.g., Jackson v. Johnson*, 217 F.3d 360, 361 (5th Cir. 2000) ("[A]bsent compelling reasons to the contrary, a federal court should apply *Teague* even when it has been implicitly waived by the State."). The state, though, went one step further. Asked at oral argument whether *Teague* applied to this case, counsel for the state lamely replied, "*Teague* has never been raised in this case." When pressed from the bench, and given an opportunity to raise *Teague* , counsel impotently responded, "I don't know why *Teague* has never been raised in this case," but did not, in fact, raise it. Because the state thus explicitly declined to invoke *Teague*, even when squarely presented with the opportunity to do so, I reluctantly conclude that it is inappropriate to analyze whether the *Teague* bar applies. I note with dismay, however, that the state has no one to blame but its own lawyer for the fact that the majority can

The majority may be right on this point. Certainly,"[t]he Constitution does not encompass all traditional legal rules and customs, no matter how longstanding and widespread such practices may be." *United States v. Lemay*, 260 F.3d 1018, 1024 (9th Cir. 2001). And indeed, the Supreme Court has warned against the wholesale importation of common law and evidentiary eerules into the Due Process Clause of the Constitution. Thus, in *Dowling v. United States*, the Court explained that a rule or practice must be a matter of "fundamental fairness" before it may be said to be of constitutional magnitude. 493 U.S. 342, 352 (1990); *see also id.* ("[B]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation."). But as we have pointed out before, the Supreme Court has further explained that"the primary guide for determining whether a rule is so`fundamental' as to be embodied in the Constitution is historical practice." *Lemay*, 260 F.3d at 1025 (citing *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996) (plurality opinion)). And as we have recognized,"it seems clear that the general ban on propensity evidence has the requisite historical pedigree to qualify for constitutional status." *Id.* (*citing Old Chief v. United States*, 519 U.S. 172 (1997); *Michelson v. United States* , 335 U.S. 469 (1948); and *McKinney v. Rees*, 993 F.2d 1378 (9th Cir. 1993)); *see also, e.g., Harrison's Trial* , 12 How. St. Tr. 834, 864 (Old Bailey 1692) (Holt, C.J.) (excluding propensity evidence in a murder trial, remarking, "Hold, what are you doing now? Are you going to arraign his whole life? Away, away, that ought not to be; that is nothing to the matter"); *Hampden's Trial*, 9 Cob. St. Tr. 1053, 1103 (K.B. 1684) (Withins, J.) (excluding evidence of prior forgeries from the trial of a man accused of forgery, explaining that the evidence would "rak[e] into men's course of life, to pick up evidence that they cannot be prepared to answer to"). *See generally* Louis M. Natali, Jr. & R. Stephen Stigall, "*Are You Going to Arraign His Whole Life?": How Sexual Propensity Evidence Violates the Due Process Clause*, 28 LOYOLA U. CHI. L.J. 1, 12-23 (1996).

Accordingly, it may be true that the jury instruction in this case, which explicitly invited the jury to consider past crimes committed by Garceau as evidence of his guilt in this case, violated Garceau's due

apply its newly-minted rule in this case.

process rights. Presuming, as we must, that the jury in this case followed its instructions, *see, e.g., Weeks v. Angelone*, 528 U.S. 225, 234 (2000), we must conclude that the jury considered Garceau's prior crimes as evidence that he committed the crime for which he was being tried. Because such consideration puts a thumb on the prosecution's side of the scales of justice and may well allow conviction on evidence that does not demonstrate guilt for this crime beyond a reasonable doubt, it seems fair to reason, as the majority does, that it violates the Due Process Clause. *Cf. People v. Garceau*, 862 P.2d 664, 691 (Cal. 1993) (in bank) (noting that when "other crimes" evidence is considered to show propensity, it "invites the jury to be swayed by speculation that, because the defendant previously has murdered, he or she also committed the charged murder").

II

Even assuming that Garceau suffered a violation of his constitutional rights, though, I simply cannot conclude that Garceau is entitled to federal habeas relief. For even if the "prior crimes" instruction violated Garceau's due process rights, on habeas review we may grant relief only if the alleged error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637. That is, Garceau is entitled to habeas relief only if he can show that any constitutional violation "resulted in `actual prejudice.' " *Id.*

I begin by noting that, for purposes of this analysis, the introduction of evidence of Garceau's prior crimes was not itself problematic. As the majority correctly points out, there was a permissible, non-propensity inference that the jury could have drawn from this evidence. *See supra* , Maj. Op. at 17256 (admitting that in this case, "there is a permissible inference that the jury could draw from the other crimes evidence"). Indeed, as the California Supreme Court explained, the other-crimes evidence

> was *not* introduced over the objection of the defense, but rather *at its invitation*. The defense sought to include such evidence in an effort to persuade the jury of the likelihood that some other member of the drug conspiracy killed Greg Rambo and the Bautistas.

Garceau, 862 P.2d at 691. Thus, the only question to be answered is whether the giving of the "other crimes" instruction itself, which specifically invited the jury to draw the propensity inference, resulted in "actual prejudice " to Garceau under the highly deferential standard of *Brecht* . In my view, the answer to that question is emphatically "no."

The majority analyzes the factors outlined in *McKinney v. Rees*, 993 F.2d 1378, 1384 (9th Cir. 1993) and concludes that any constitutional error committed by the trial court when it gave the "other crimes" instruction was not harmless under *Brecht*. This analysis, though, ignores one unassailable truth about the facts of this case: the jury heard evidence that Garceau had killed Rambo only from the same drug partners who testified that he killed the Bautistas. The state did not introduce evidence of Garceau's conviction for Rambo's murder. As a result, the State's entire case rested on the credibility of Garceau's drug partners. *Cf. Garceau*, 862 P.2d at 691 (explaining that "it was clear the defense desired that the jury consider th[e] ["other crimes"] evidence for the purpose of establishing defendant's innocence of the charged offenses"). That the jury convicted Garceau therefore strongly suggests that the jury found the State's witnesses credible, and thus, only factors that eroded the credibility of the drug partners would have changed the outcome. I cannot believe that the jury would have believed Garceau's drug partners when they said that Garceau committed the other crimes, but then doubted them when they said that he committed the Bautista murders, only to have that doubt mollified by the propensity instruction. The jury either believed the testimony of the drug partners, or it did not. Because this credibility determination would not have been undermined by removing the propensity inference from the jury's deliberations, I simply cannot comprehend how a proper jury instruction would have changed the outcome. *Cf. Franklin v. Henry*, 122 F.3d 1270, 1273 (9th Cir. 1997) (holding error not harmless where it undermined the credibility of key witnesses).

While the majority may be correct in asserting that the evidence of Garceau's guilt was not, as the state contends, "overwhelming," that is not to say that the propensity inference was the key to the State's case on the question of Garceau's guilt. Indeed, as I have already explained, the key to the state's case was the credibility of Garceau's drug partners--and the inference in no way affected that credibility. Accordingly, I am not

persuaded that the instruction was harmful under *Brecht*. *Cf. Penry v. Johnson*, 121 S. Ct. 1910, 1920 (2001) (concluding that any error in admitting evidence did not have a"substantial and injurious effect" on the verdict under *Brecht* where the evidence admitted "was by no means the key to the State's case").

III

No one seriously disputes that the jury instruction given in this case violated California evidentiary law. But that alone is not enough to merit federal habeas relief. As we have explained before,

> We are not a state supreme court of errors; we do not review questions of state evidence law. On federal habeas we may only consider whether the petitioner's conviction violated *constitutional* norms. . . .
>
> [F]ailure to comply with the state's rules of evidence is neither a necessary nor a sufficient basis for granting habeas relief. While adherence to state evidentiary rules suggests that the trial was conducted in a procedurally fair manner, it is certainly possible to have a fair trial even when state standards are violated. . . .

Jammal v. Van de Kamp, 926 F.2d 918, 919 (9th Cir. 1991) (emphasis added). In this case, the propensity instruction may well have violated Garceau's due process rights. But even that is not enough. As a federal habeas petitioner, Garceau must also show actual prejudice. This he has not done; thus, he is not entitled to habeas relief from this court. Because the majority today grants a new trial (or, alternatively, freedom) to a man who (i) was duly convicted under California law of brutally killing two innocent women, and (ii) is not being held in violation of the Constitution of the United States, I dissent.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT FREDERICK GARCEAU,

Petitioner-Appellant,

v.

JEANNE WOODFORD, Acting Warden of San Quentin State Prison,

Respondent-Appellee.

No. 99-99022

D.C. No. CV F-95-5363 OWW

ORDER DENYING REHEARING

Filed February 15, 2002

Before: Diarmuid F. O'Scannlain, A. Wallace Tashima, and Sidney R. Thomas, Circuit Judges.

ORDER

Despite the fact that it "explicitly declined to invoke *Teague*," either in the trial court or in this court, *Garceau v. Woodford*, 275 F.3d 769, 781 n. 1 (9th Cir. 2001) (O'Scannlain, J., dissenting), the State, in its petition for rehearing, asks us to invoke the rule of *Teague v. Lane*, 489 U.S. 288, 310 (1989), that a "new rule" of constitutional law cannot be applied retroactively to cases on collateral review, and to deny relief to petitioner on that ground. We decline the invitation under the law of our circuit. *See Boardman v. Estelle*, 957 F.2d 1523, 1534 (9th Cir. 1992) ("We deny the petition for rehearing because the state has waived the *Teague* defense in this case."). Although we there noted that "[t]he Supreme Court has not yet decided whether a state may waive the *Teague* defense by failing timely to raise it," *id.*, the Court has since

declined to dispose of a case on the ground that a "new rule" was involved "because petitioner [State warden] did not raise a *Teague* defense in the lower courts or in his petitioner for certiorari." *Godinez v. Moran*, 509 U.S. 389, 397 n. 8 (1993) (citations omitted). Accordingly, even though we have the discretion to consider a *Teague* claim raised for the first time on a petition for rehearing, *See Boardman*, 957 F.2d at 1536-37, we decline to do so here where the State's lawyer declined to raise *Teague*, even after the panel inquired of him directly at oral argument whether the State wished to do so. *See Garceau v. Woodford*, 275 F.3d at 781 n. 1 (explaining that under the circumstances, "I reluctantly conclude that it is inappropriate to analyze whether the *Teague*" bar applies) (O'Scannlain, J., dissenting).

Judges Tashima and Thomas vote to deny the petition for panel rehearing and Judge O'Scannlain votes to grant it. The panel votes to deny the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. *See* Fed. R. App. P. 35(b).

The petition for panel rehearing and the petition for rehearing en banc are denied.

FILED
FEB 25 2002
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT FREDERICK GARCEAU,

Petitioner-Appellant,

v.

JEANNE WOODFORD, Acting Warden of San Quentin State Prison,

Respondent-Appellee.

No. 99-99022

D.C. No. CV F-95-5363 OWW

ORDER

Before: TASHIMA, Circuit Judge:

Pursuant to the motion of respondent-appellee, issuance of the mandate is stayed pending the filing of a petition for a writ of certiorari in the Supreme Court. The stay is granted prusuant to Fed. R. App. P. 41(d)(2), and is subject to the limitations of Fed. R. App. P. 41(d)(2)(B).

FILED
Jul 30 4 29 PM'99
Clerk, U.S. District Court
Eastern District of Calif
By_____
Deputy

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

ROBERT FREDERICK GARCEAU,	Case No. CIV. F-95-5363- OWW-P
Petitioner,	Death Penalty Case
vs.	Memorandum and Order Denying Petition for Writ of Habeas Corpus and Denying Issuance of Certificate of Probable Cause
JEANNE S. WOODFORD, Acting Warden of San Quentin State Prison,	
Respondent.	

I. Introduction

Robert Garceau ("Garceau") petitions for a writ of habeas corpus, alleging his first degree murder convictions and death penalty violate the United States Constitution. Jeanne Woodford ("the State") responds that no error occurred at Garceau's trial which substantially influenced the jury's verdict or would otherwise justify relief. *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993).

II. Procedural History

Garceau was convicted in Kern County of first degree murder for the September 1984 stabbing deaths of Maureen ("Maureen") and Telesforo ("Telesforo") Bautista. The special circumstance of multiple

murder was found true. CT-6:1386-90 (Guilt and Special Circumstance Verdicts).[1] The jury fixed the penalty at death. RT-XVI:10. Sentence was pronounced July 30, 1987. RT-1:246.

The California Supreme Court denied Garceau's habeas petition on the merits September 1, 1993; affirmed his conviction and sentence November 18, 1993, *People v. Garceau*, 6 Cal. 4th 140 (1993); and denied a petition for rehearing January 26, 1994. The United States Supreme Court denied certiorari October 3, 1994.

Garceau requested counsel and a stay of execution in this Court May 12, 1995. Counsel was appointed June 26, 1995. Garceau filed his federal petition July 2, 1996. A motion to dismiss Claims Z and AA for failure to exhaust and state a federal claim was granted September 23, 1997. Claims D and E were found unexhausted, but exhaustion was excused on futility grounds under California's timeliness rules.[2] Garceau's request for evidentiary hearing, and related claims A, B, D, H, S, X and Y, were denied on the merits March 30, 1999.[3]

III. Applicability of the AEDPA

Garceau's case is not subject to the amendments to Chapter 153,

---

1. The state record on appeal is cited as follows: "CT" for Clerk's Transcript, volumes 1-6; and "RT" for Reporter's Transcript, Volumes I-XV (guilt phase), XVI (jury deliberations and verdicts at guilt and penalty phases), and 1 (penalty phase). A colon separates the volume and page numbers.

2. California's procedural rules regarding timeliness were inadequate to bar federal review at the time of Garceau's state appeal. *See Calderon v. U.S. Dist. Court (Bean)*, 96 F.3d 1126 (9th Cir. 1996); *Calderon v. U.S. Dist. Court (Hayes)*, 103 F.3d 72 (9th Cir. 1996).

3. The Statement of Facts and the analysis of Claims A, B, D, H, S, X, Y, Z, AA and parts (b) and (g) of Claim BB are set forth in prior orders of September 23, 1997 and March 30, 1999. They are repeated here for convenience.

Title 28 of the United States Code, promulgated by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *Lindh v. Murphy*, 521 U.S. 320, 336 (1997) (amended Chapter 153 provisions apply only to cases filed after its effective date); *Calderon v. U.S. Dist. Court (Kelly V)*, 163 F.3d 530, 540 (9th Cir. 1998) (en banc), *cert. denied*, ___ U.S. ___, 119 S. Ct. 1377 (1999) (habeas corpus case is pending or filed when an application for a stay of execution and appointment of counsel is filed).[4]

IV. Facts

On September 6 or 7, 1984, Garceau fatally stabbed his girlfriend, Maureen Bautista, and her 14-year-old son, Telesforo, who witnessed his mother's killing, in a Bakersfield apartment. Garceau left the scene and several hours later two of his acquaintances, Greg Rambo ("Rambo") and Larry Tom Whittington ("Whittington"), went to the apartment to remove the bodies. They concealed the bodies inside a bedroom dresser. Garceau and Rambo returned the next day and transported the dresser with the bodies to Rambo's Shandon, San Luis Obispo County residence. The dresser was buried under a layer of concrete in Rambo's backyard. On February 19, 1985, Garceau shot and killed Rambo in a shed in Parkfield, in southwest Monterey County. Garceau and Harlyn Codd ("Codd") disposed of Rambo's body in a ravine, in remote Tulare County.[5]

No physical evidence directly linked Garceau to the Bautista

4. The State's motion to apply Chapter 154 of the AEDPA to Garceau's case was denied. *See* Order Regarding Respondent's Motion to Apply Chapter 154 to Pending Death Penalty Cases, filed December 21, 1998.

5. Prior to his Kern County trial, Garceau was convicted in Monterey County for the Rambo killing, and sentenced to 33 years to life. That conviction was affirmed June 3, 1987. *See People v. Garceau*, Case No. H001539 (6th Dist.Ct.App. 1987).

murders. Several of Garceau's acquaintances testified he confessed to committing the crimes before his arrest in March of 1985. The defense focused on attacking these witnesses' credibility, contending they had equal motives as Garceau to kill Maureen. Garceau presented no alibi evidence, nor did he testify.

The prosecution's case rested largely on Garceau's numerous confessions to various persons with whom he manufactured methamphetamine. The prosecution argued Garceau killed Maureen to prevent her from "snitching him off" about his drug activity, and killed her son, Telesforo, to eliminate the witness to his mother's murder. Numerous witnesses testified to Garceau's intense hatred of "snitches" and Garceau's frequent statement, both before and after the murders, "snitches die."

Susan Rambo ("Susan"), Greg's widow, testified under a grant of immunity. RT-X:2602. She described Garceau's confession about the murders of the Bautistas, and Garceau's methamphetamine manufacturing operation. Drug activity began in the summer of 1984 in a small trailer behind the Rambos' Shandon house.[6] RT-X:2571-72, RT-XI:2606-07. Whittington introduced Garceau to the Rambos. RT-X:2570, RT-XI:2607. Whittington financed the operation, provided supplies for manufacturing, and sold the finished drugs. RT-X:2572, RT-XI:2771. Garceau was the "cook," who mixed chemicals to produce methamphetamine. RT-X:2571, RT-XI:2770-71. Rambo helped cook and, with Susan, served as a lookout. RT-X:2573, 2571, RT-XI:2614. Susan testified Whittington paid them cash and methamphetamine to use the Rambo property. RT-XI:2622-23.

Several witnesses testified Garceau constantly "freebased" (smoked) cocaine. RT-X:2426 (Linda Rich); RT-X:2597-98, RT-XI:2640-41 (Susan); RT-XI:2831 (Whittington); RT-XII:3100 (Codd). Whittington provided Garceau with about $4,000 worth of cocaine each week for Garceau's participation in the drug manufacturing. RT-XI:2831-32. Susan testified Garceau stayed awake

6. Codd testified Garceau and Whittington manufactured methamphetamine in Tulare County prior to the move to Shandon. RT-XII:3064.

by smoking his cocaine pipe for the two to three days it took to prepare a batch of methamphetamine. *Id.*:2622. Whittington and Susan both testified Garceau frequently freebased cocaine, even when not manufacturing methamphetamine, and was rarely without cocaine for more than four or five days. *Id.*:2831-32. Codd stated Garceau "could put away an ounce of coke freebasing a day if he had it with him." RT-XII:3100. Linda Rich, Maureen's friend, testified Garceau freebased cocaine when Telesforo was present, although he was kind to Telesforo and gave him gifts, and that he had a stormy relationship with Maureen. RT-X:2426-27, 2418, 2425-26.

At the end of August or in early September 1984, Maureen and Telesforo joined Garceau, Whittington, Whittington's brother Bill, and Codd on a fishing trip at Lake Isabella. RT-X:2574-75, RT-XII:3067, 3086-87. Codd overheard an argument between Garceau and Maureen, in which Garceau threatened to kill Maureen because she planned to "snitch" to Eddie about the drug operation.[7] RT-XII:3067-68, 3087. According to Susan, Codd told her Eddie Nash, a.k.a. Edel Nasralla ("Nash") was Garceau's number one enemy, was Telesforo's biological father, and sought Garceau for his failure to fulfill a contract for which Nash had paid him. RT-XI:2661, 2713. Susan testified Garceau said he killed Maureen because "she wanted to go to Nash." *Id.*:2643.

Over objection, the prosecution presented evidence to establish Garceau's connection with Nash. RT-XI:2735-52. Michele Christie, who claimed to be Nash's former girlfriend, testified she saw Garceau at Nash's house. RT-XII:3000, 3002-03. Whittington testified he heard Garceau talk about Nash over the years, especially since Garceau had been with Maureen. RT-XI:2780-81. Nash denied he knew Garceau, Maureen, or Ms. Christie. RT-XI:2725-26. Officer Sylvester, who worked for the Los Angeles Police Department, Narcotics Division, Major Violators Section and who served a search warrant at Nash's home, *id.*:2754-55, and Judge Ronald Coen, who had previously

---

7. Codd testified Garceau did not mention Eddie's last name. Neither the prosecution nor defense questioned Codd about whether he knew Eddie Nash or had heard Garceau speak of Nash.

prosecuted Nash, *id.*:2882, both testified about Nash's criminal activities and reputation for violence. *Id.* 2757-58, 2883.

On September 4, 1984, Maureen and Telesforo registered at a motel in Bakersfield. RT-X:2455-58. The motel manager recalled seeing Garceau on the premises that afternoon. *Id.*:2458-60. Telesforo paid daily for the room for the next two days. *Id.*:2461. Sometime late on the sixth of September, Garceau and the Bautistas moved to Patricia Shepard's ("Shepard") apartment. *Id.*:2473-74, RT-XI:2778.

Shepard, who then lived with Whittington, rarely used her apartment. RT-X:2481-82, 2519. Shepard kept the apartment in case she and Whittington separated, since he was married to another woman. *Id.*:2518. Whittington testified either he or Shepard gave Garceau a key to the apartment. RT-XI:2773.

Garceau called Whittington about midnight on September 6, 1984, and asked Whittington to meet him at Shepard's apartment. RT-XI:2776-77. When Whittington arrived, Garceau explained he and Maureen were fighting and left the motel because they were concerned someone would call the police. *Id.*:2778. Whittington noticed the telephone appeared to have been ripped from the wall. *Id.* Garceau said he was afraid Maureen was planning to "snitch him off" to Nash or Nash's attorney, and that Nash was scheduled to be released from prison the following day. *Id.*:2778-79. Garceau asked Whittington whether he was just being paranoid. *Id.*:2779. Whittington told him, "Yeah, it was all in his head, he was just paranoid over nothing." *Id.* When Whittington asked about Maureen and Telesforo, Garceau said they were sleeping. *Id.* Whittington did not see them nor hear any sounds from them. *Id.*:2779-80.

The next morning, Whittington was awakened by Garceau knocking at his front door. RT-XI:2781. Garceau entered and announced, "I did it. . . . I killed them. . . . I killed Maureen and the kid." *Id.*:2782. Garceau told Whittington that Maureen "was going to snitch me off. . . . I know how to take care of snitches." *Id.* Whittington stated Garceau said Telesforo was killed "because he was a witness, he seen [sic] him kill his mother." *Id.* When Whittington told Garceau to be quiet so Shepard would not overhear, Garceau replied she should know since the deaths occurred at her apartment, after which Shepard joined the conversation. *Id.*:2783.

Shepard testified Garceau told them he killed Maureen and Telesforo, RT-X:2487, that he slit their throats and demonstrated the manner of the stabbing. *Id.*:2489, 2508-09. Shepard testified Garceau said he knew how to take care of snitches, *id.*:2501; that he killed Maureen because they were arguing and killed Telesforo because he witnessed his mother's death. *Id.*:2489. Garceau told Shepard and Whittington that Telesforo had been afraid of "Jason," the fictional killer from the "Friday the Thirteenth" movie, but he should have been afraid of Garceau instead. RT-X:2502. A short time later, Garceau left Whittington's house driving Maureen's beige Honda Accord, saying he had to leave town. RT-XI:2783-84.

Susan Rambo testified Garceau sped into her yard on a Friday morning early in September,[8] driving Maureen's car. RT-X:2576, 2580, 2630. Susan stated Garceau was "very hyper, very -- not very coherent . . . very excited," rambling, "They wouldn't believe me. I kept telling them. They wouldn't believe me. . . . They should know what happens to snitches. I kept telling them. They wouldn't believe me. Now she's dead." *Id.*:2577-78. While smoking his cocaine pipe, Garceau explained Maureen was going to "snitch" on everyone in the drug operation. *Id.*:2578. Susan testified Garceau told her Telesforo began screaming when Garceau stabbed Maureen, that Garceau told him to shut up, then stabbed him when he did not, saying, "You have to take out all witnesses." *Id.* Susan noticed dark stains on Garceau's pants, and observed him later that day seated by her washing machine, naked, while the machine was operating. *Id.*:2579-80.

Later the same day, Greg Rambo left with Garceau, telling Susan they were going to Bakersfield to Shepard's apartment. RT-X:2581. Whittington testified Rambo and Garceau came to his house and talked about how to clean up Shepard's apartment. RT-XI:2786. Whittington and Rambo went to the apartment and placed the Bautistas' bodies in a dresser. *Id.*:2788, 2792-93. Whittington refused to continue assisting

---

8. Monterey County District Attorney's Investigator Richard Lee testified that during his interview with Susan, she estimated the Friday when Garceau appeared to be September 7, 1984. RT-XIII:3496.

when Rambo "kicked down [Maureen's] shoulder" to make her body fit in the dresser. *Id.*:27943-94. Rambo returned to the apartment the next day with Garceau to remove the dresser containing the bodies. *Id.*:2796-98. Garceau and Rambo placed the dresser in a cardboard box and transported the dresser to the Rambos' house. RT-X:2583. They left the dresser behind the Rambos' house, and went to Los Angeles to retrieve Garceau's belongings from Maureen's apartment. *Id.*:2584-85. Garceau told Susan he was going to retrieve their things "so it would appear that all three of them were gone and disappeared at the same time." *Id.*:2582.

Rambo called Susan from Los Angeles and requested she contact his cousin, Doug Frederick, and have him dig a hole in their backyard. RT-X:2586, RT-XI:2659-60. Rambo instructed Susan to tell Doug the hole was for a new drainage system for the dog kennels in their backyard. *Id.*:2633, 2660. Susan did so. RT-X:2450, RT-XI:2634. Doug testified he dug the hole in early September 1984. RT-X:2446. Susan stated she awoke on Monday morning to the sound of Doug's backhoe operating on their property. *Id.*:2586, RT-XI:2660. Rambo had returned from Los Angeles by then, and was present during the digging of the hole. RT-X:2586, 2453.

Susan noticed the presence of several bags and boxes following Garceau's return from Los Angeles, along with a computer, a television, a stereo, and some guns. RT-X:2586-87. On Monday afternoon she also noticed the cardboard box which had contained the dresser was "flattened out." *Id.*:2587-88. At Garceau's request, Susan purchased cement to place over the dresser, *id.*:2589, bags for the bodies, and a needle and some string to sew up the bags. RT-XI:2657-58. During the next few days, Susan observed Garceau shoveling dirt into the hole. RT-X:2590.

Whittington and Shepard returned to Shepard's apartment a few days after the bodies were removed to clean up the bloodstains. RT-XI:2798-99, RT-X:2492. They were able to remove the visible stains, although those on the carpet required repeated effort to clean. *Id.*:2799. Shepard testified she purchased cleaning supplies, bags and duct tape, *id.*:2494-95, and helped clean the apartment. *Id.*:2502.

Susan Dalton ("Dalton"), Maureen's friend, reported Maureen missing near the end of September 1984. RT-XII:2993-94. Dalton last

spoke with Maureen on September 2, 1984. *Id.*:2993. The missing person's report was prompted in part by Dalton's visit to Maureen's residence, which appeared abandoned. RT-XII:2994. Photographs were scattered throughout the house, and it looked as if someone had "gone through" the house. *Id.*:2996. Garceau's clothes were gone, as well as Maureen's cars, stereo, television and Telesforo's computer. *Id.*:2994-97.

Susan Rambo explained that when Garceau told her about the killings, he reminded her to beware of what happens to "snitches," implying the same would happen to her if she said anything. RT-XI:2650. Garceau's threats made her afraid to contact the police, *id.*:2690-91, as did additional threats he made on subsequent occasions while he resided at their house through November, about the "law of snitches" and his habit of carrying a gun and knife. *Id.*:2715-16. Garceau told her, "You know what happens to snitches," took a kitchen knife, declared it to be "just about right," and made stabbing motions. RT-X:2591. Another time Garceau popped open a switchblade knife "he would play with . . . constantly" and stabbed a cardboard box she was carrying. *Id.*:2592. Garceau moved out of their residence in late November or early December of 1984 to a trailer house on her father's property in Parkfield, where he continued to manufacture methamphetamine. *Id.*:2591, 2594.

Susan recounted that Greg Rambo pistol-whipped her and placed a gun to her head on January 23, 1985, because he was angry at her failure to notice a pickup truck which had parked in their backyard. RT-XI:2668-69. Susan had an extended altercation with Rambo, who finally told her she had five minutes to get her stuff and get out. *Id.*:2671. Susan left for Parkfield to live with her parents. *Id.*:2662.

Susan last saw Rambo alive on February 19, 1985. RT-XI:2662-63. He had been drinking, was in a rage, and followed her around Shandon and neighboring Cholame. *Id.*:2663, 2666-67. Susan drove Garceau's Blazer at the time, as Garceau had asked her to pick up some groceries for him. *Id.*:2672-73. Susan was frightened by Rambo's behavior and decided to go to a friend's house in Gonzales. *Id.*:2672-74. She called Garceau to tell him she had left town in his Blazer and would not bring his groceries. *Id.*:2673. On the following day, Garceau telephoned and told her she could come home, that Rambo would "never

bother her again." *Id.*:2674. She feared Garceau meant Rambo was dead. *Id.*:2674-75.

Susan's father and brother then told her they saw Rambo go toward Garceau's trailer the previous day, heard gunshots, and then saw Garceau leave in Rambo's pickup. *Id.*:2676-77, RT-XII:3229-32, 3259-60. She later gave Garceau a sleeping bag when he requested "an old tarp or something to dispose of some things," which she assumed to be chemicals from the drug manufacturing. RT-XI:2677-78. Garceau also asked to borrow her father's bulldozer to dig a hole, but her father refused. *Id.*

Codd testified that in February 1985, Garceau called him and said he shot Rambo three times and killed him. RT-XII:3082. Garceau wanted Codd to come to Parkfield, but Codd was intoxicated when Garceau first called. *Id.* Garceau called again the next day, and Codd went to Parkfield the third day to see if Rambo was really dead. *Id.* Garceau told Codd he killed Rambo because he feared Rambo "was going to be a snitch." *Id.*:3070. Around the same time, while Garceau and Codd were watching a violent movie, Garceau confessed to killing Maureen and Telesforo. RT-XII:3068-69, 3106. Codd stated the movie nauseated Garceau, reminding him of what happened. *Id.*:3068. Garceau told Codd he "offed" Maureen and her son[9] by cutting them up. *Id.*:3069. Codd later asked and received Whittington's confirmation that Garceau confessed. *Id.*:3104.

Codd saw Rambo's body wrapped in a sleeping bag and a blanket, in a shed next to the Parkfield lab. RT-XII:3070-71. Codd agreed to move the body later. Garceau and Codd went to the trailer, where Garceau freebased cocaine. *Id.*:3072. Codd took some cocaine to stay awake, as he did not trust Garceau. *Id.* Garceau told Codd he wanted to dismember Rambo's body to prevent identification. RT-XII:3073. Instead, they drove to Tulare County, deposited Rambo's

---

9. Codd referred to Maureen's son as "Brian," RT-XII:3087, stating that was how Garceau introduced him, and also what Maureen called him. *Id.* This inconsistency is minor and does not impact the fact that the rest of Codd's testimony is consistent with the other evidence presented at trial.

body in an orange grove, and returned to Codd's apartment. *Id.* The following morning, they retrieved the body and transported it to an isolated section of the county, dumping it in a ravine around Deer Creek. *Id.*:3073-74. Codd admitted he selected the site because Sheriff Bob Wiley owned the property, he hoped Rambo's body would be discovered, and Garceau would be unable to return to dismember the body. *Id.*:3076, 3010-11. Although Codd later led authorities to Rambo's body, when first questioned, he denied any knowledge of Rambo's murder. RT-XII:3105, 3112. Codd did not tell sheriff's deputies that Garceau had confessed to killing Maureen and Telesforo. *Id.*:3105-06.

Wayne James ("James"), another acquaintance of Garceau, testified Garceau hated "snitches" and told James he killed Maureen because she was going to "snitch him off," and that her son[10] walked in, so he had to "snuff him" too. RT-XII:3184-85. Garceau told James he killed Maureen and her son by stabbing them and cutting them up with a knife. *Id.* James had been involved in drug manufacturing with Garceau previously, and used and sold drugs. RT-XII:3185-86, 3189. At trial, James testified Garceau threw him a spent .38 cartridge, telling him it was the shell that killed Rambo. *Id.*:3184. Garceau also told James that he and Codd had disposed of Rambo's body the previous evening in a ravine outside Porterville. *Id.*:3184, 3187. James did not notify the police about Rambo's murder or the Bautistas' murders until a few days before he testified. *Id.*:3190.

On March 3, 1985, Susan reported her husband missing to the San Luis Obispo County Sheriff's Department. RT-XI:2681. She explained, despite her knowledge of evidence of Rambo's violent death, she "had a hope it wasn't true," and did not know for sure until Rambo's body was found. *Id.*:2684. She acknowledged she was the beneficiary of Rambo's $100,000 life insurance policy, and told Garceau she needed

---

10. James also testified Garceau and Maureen introduced her son as "Brian." RT-XII:3188. Whether or not this is true does not impact the consistency of the remainder of his testimony when compared with the other evidence presented at trial.

to locate Rambo's body in order to collect the insurance. *Id.*:2673, 2684, 2722. Susan cleaned up the Parkfield shed which had concealed Rambo's body, RT-XI:2678-79; assisted friends in searching for him, *id.*:2686-87; and phoned Rambo's answering machine several times in front of others to fool them into believing she was attempting to locate Rambo. *Id.*:2687-88. She engaged in these activities due to fear of Garceau, Whittington, and Whittington's brother Bill, all of whom carried machine guns and automatic weapons. *Id.*:2689-90.

Near the end of February 1985, Susan was "very upset" and Garceau told her he did not think she "was going to hold up in front of questioning or . . . be able to keep up [her] part." RT-X:2596. Garceau gave her his driver's license so she would "get [his] name right if you snitch, if you go to the cops." *Id.* Susan interpreted his remark, made while his gun lay on the bed near them, as some kind of macho dare. *Id.* She replied she was attempting to avoid confrontations with anyone who would ask her questions. *Id.* Garceau told her he was "ready for the gas chamber . . . ready any time." *Id.*:2603.

On March 6, 1985, Susan contacted the Monterey County Sheriff's Department. RT-X:2601, RT-XII:3134. Her statements led, two days later, to the excavation of two bodies buried under a layer of concrete behind the house in Shandon. RT-XII:3135-37, RT-X:2370-77. Dental records confirmed the bodies were those of Maureen and Telesforo Bautista. RT-X:2415.

Dr. Karl Kirschner, a forensic pathologist, conducted autopsies on the Bautistas' bodies March 9, 1985. RT-X:2403-04. He opined the bodies had been buried at least four months. *Id.*:2409. Narrow cuts in the victims' clothing confirmed that they had been repeatedly stabbed. *Id.*:2410. Dr. Kirschner found Maureen had been stabbed eleven times in the chest. *Id.*:2404. "[A]ny one of [the wounds] could have been fatal" as each one entered the chest cavity. *Id.*:2408. Maureen suffered stab wounds to her ears and jaw while she was still alive, and was in severe pain from a cut nerve in her jaw. *Id.*:2405-06, 2408-09. Telesforo was been stabbed five times in the chest and twice in the back, causing fatal injuries to his lungs and heart. *Id.*:2410.

Expert testimony identified blood splatters found in Shepard's apartment as consistent with the infliction of stab wounds, with the Bautistas' blood types, RT-XII:3040, 3028, and the presence of

commercial detergent products. *Id.*:3035. Carpet fibers found in the dresser with the bodies were consistent with those obtained from Shepard's apartment. *Id.*:3047.

Monterey County Sheriff Office Investigator David Neely, and other Monterey and Tulare Counties officers, interviewed Codd on March 12, 1985, regarding Rambo's murder. RT-XII:3150-51. Codd eventually took them to where Rambo's body had been dumped, but it was too dark. They returned the next day and recovered Rambo's body. *Id.*:3105. Dr. Leonard Miller, the pathologist who performed the autopsy on Rambo's body, *id.*:3203-05, confirmed Rambo was shot three times, fatally by a wound to the heart, approximately three to four weeks earlier. *Id.*:3205-06.

Garceau was arrested at a coffee shop in Gorman on March 13, 1985. RT-XII:3336. At the time of his arrest, he claimed his name was Richard Brokaw, *id.*:3338, a name he had used to register at a nearby motel. *Id.*:3150. A search of Garceau's vehicle and motel room resulted in the seizure of several types of ammunition, loose cartridges, a clip, shotgun shells, *id.*:3141, 3143-45, and Garceau's wallet, which contained documents or identification in five names, including his own and that of Greg Rambo. *Id.*:3146-47. Shortly after his arrest, Garceau telephoned Codd, stating that he had been "snitched off" and was "going to get the pill." *Id.*:3078-79.

Richard Lee ("Lee"), a Monterey County District Attorney's investigator, witnessed Garceau's April 4, 1985 statement while Garceau was incarcerated in the Monterey County jail (in connection with Rambo's murder. Garceau asked, "So you guys aren't going to try me; is that right?" RT-XII:3351-52. Lee replied Garceau would be tried in Kern County for the Bautista murders before the trial in Monterey County for Rambo's murder. *Id.*:3352. Garceau replied this was stupid because, "They can only gas me once. They can only take my wheels one time. Do you know what I mean?" *Id.* Lee responded, "Come on, Bob, that's negative vibes." *Id.* Garceau laughed and said, "Yeah, negative vibes, that's right. I'm still breathing and there's a few people who ain't." *Id.* Garceau then laughed again. *Id.*

The defense sought to establish that one or more of the other participants in the Shandon drug operation had both the motive and opportunity to commit the Bautista and Rambo murders. The defense

called witnesses to cast doubt on the credibility of the key prosecution witnesses. In particular, the defense concentrated on Whittington's evasive and occasionally contradictory pretrial testimony, his cover-up of the Bautista murders, his drug involvement, criminal record, and willingness to lie. RT-XI:2807-73. The defense offered testimony aimed at undermining Susan's credibility by revealing her drug involvement, her knowledge of and silence about the murders, and emphasized her odd behavior after Rambo's disappearance. *Id.*:2606-2707, 2723-24. The defense suggested Susan might be involved in Rambo's murder, to pursue an intimate relationship with Garceau and to collect on Rambo's life insurance policy.

At the penalty phase, the prosecution introduced stipulations establishing that Garceau had been convicted of a second degree burglary in 1972 and possession of a silencer in 1981, both felonies. RT-1:41. Over defense objection, the prosecution presented evidence of Garceau's possession of firearms in 1981 and 1982, and of his involvement in an alleged kidnapping in 1982.

Los Angeles Officer Douglas Gerst ("Gerst") testified he recovered numerous weapons during two 1981 searches of a residence in Canoga Park. RT-1:42-43. The weapons included a Mac Ten machine gun with a silencer, two automatic pistols, six revolvers, six rifles, and twelve shotguns. *Id.*:43-45. Gerst testified that thousands of rounds of ammunition were found inside the residence, and utility receipts established Garceau resided there. *Id.*:46.

Diane Sems testified about an incident in June 1982, in which her former boyfriend, Terry Fabricant ("Fabricant"), forced her into a pickup truck driven by another man. RT-1:53, 60. Ms. Sems was blindfolded and driven to a house she did not recognize, *id.*:53-54, where she observed guns. *Id.*:56. She was forced by Fabricant to ingest drugs and was beaten by Fabricant. *Id.*:55, 58-59. After Fabricant fell asleep hours later, she escaped. *Id.*:55. The next day, no longer under the influence, she identified the driver of the pickup from a police photo lineup. *Id.*:57. Ms. Sems testified Garceau resembled the driver, although she was uncertain and admitted she could not now identify the driver. *Id.*:57-59. Fabricant testified he knew Garceau in June of 1982, and that Garceau drove a pickup truck at the time. RT-1:62. Fabricant was not questioned about nor did he testify regarding the alleged kidnapping.

Los Angeles Detective Philip Quartararol ("Quartararol"), conducted the photo lineup with Ms. Sems. Ms. Sems did not appear under the influence at the time and Ms. Sems identified Garceau as the driver of the pickup. *Id.*:64-65. Det. Quartararol obtained a search warrant for 21027 Runnymede as a result of Ms. Sems's complaint, the same house Gerst had searched one year earlier, and recovered two semiautomatic weapons, two shotguns, and several thousand rounds of ammunition. *Id.*:66. Under the law in effect at the time, possession by a felon of the weapons recovered in the search were not illegal, since the weapons were not concealable. *Id.*:68-69.

The defense presented evidence in mitigation relating to Garceau's prison history, his upbringing and character, and his caring relationship with a woman and her young daughter. The defense submitted Garceau's file from prison ("cum file") for admission into evidence, arguing it indicated he adjusted well to prison, that he was a "model prisoner." RT-1:131-32.

Russell Garceau ("Russell"), Garceau's younger brother, RT-1:133-34, described Garceau's positive attributes and the repeated adversity he had faced throughout his life. Garceau was an intelligent child, an avid reader, and won poetry and art contests, *id.*:138, in spite of a childhood illness which separated him from other children, required hospitalization, and caused him to miss "quite a bit of his childhood." *Id.*:135. Russell told of their father's firearm collection. When Garceau was in junior high, he took one of their dad's guns to school to show his friends. RT-1:136-37. Upon arrival, Garceau decided it was the wrong thing to do and gave the gun to a school administrator with whom he had a good relationship. *Id.*:137. As a result, Garceau was arrested and placed in a detention hall, where he was frequently beaten before he was released. *Id.*:137-138.

Garceau joined the Army in 1965, when he was 16 years old, and served in the States and Vietnam, until his honorable discharge three years later. RT-1:138-39. Garceau seemed bitter when he return from Vietnam. *Id.*:139-40. Garceau moved from Ohio to California around 1969. Russell followed two years later. *Id.*:140. Garceau was unemployed at the time Russell moved. Russell believed Garceau was committing burglaries for a living. *Id.*:142. Garceau was eventually arrested for burglary and imprisoned. *Id.* Upon his release from prison,

Garceau was proud to be one of the few people in prison who had not been involved in violence or drugs. *Id.*:143.

In 1976, Garceau started a horse ranch on three to four rented acres in Chatsworth and attempted to start a hayriding business. RT-1:144-45. Russell believed Garceau was not involved in criminal activity during the two to three years he lived on the ranch, and that Garceau did not own any guns during this period. *Id.*:145-46. When the land was sold, Garceau sold his possessions and left the ranch. *Id.*:146.

Garceau had a generous nature; "he used to borrow money from me to give to [a] blind man . . . ." RT-1:147. Garceau repaid his debts, and made three years of automobile loan payments for the widow of a deceased business partner. *Id.*:147-48. Garceau often forgave the debts of others, *id.*:148-49, and after their father's death, kept in touch with their mother who lived in Ohio. *Id.*:149.

During the 1980's, Garceau "started on drugs . . . that's when I saw his whole personality change . . . . Up to that time I thought he was probably the most honorable person I had ever met . . . . Then he started getting involved in cocaine and then all of a sudden he wouldn't show up when he was supposed to, he wasn't paying back like he used to pay back his loans and in a sense, to me, became flaky, his whole life seemed to change at that time. . . ." RT-1:150-51.

Starr Calliez was introduced to Garceau by Russell in 1973, while Garceau was in prison. RT-1:154. Ms. Calliez corresponded with Garceau, visited him in prison several times, and formed an intimate relationship with him after his release. *Id.*:154-56. Ms. Calliez found Garceau "very intelligent [and] very sensitive," *id.*:158, and he was "very friendly and nice" to her six-year-old daughter, *id.*:157, bought her gifts and engaged in activities as a family. *Id.*:156-57. Ms. Calliez acknowledged Garceau did not adjust well to life outside prison, but she never knew him to use drugs or be violent. *Id.*:158-59.

Ms. Calliez's relationship with Garceau ended, and in 1983 she married someone else. RT-1:159-60. Ms. Calliez was "shocked" to learn of Garceau's involvement in the activities described at trial. *Id.*:161. Despite the evidence of Garceau's murder of a mother and child, Ms. Calliez "would still feel comfortable if she and her daughter were alone with Garceau." *Id.*:161-62.

VI. Analysis

Claim A - Ineffective Assistance of Counsel at Guilt and Penalty Phases

To establish trial counsel's performance was constitutionally defective, Garceau must satisfy the two-prong test from *Strickland v. Washington*, 466 U.S. 668 (1984). First, "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. "The ultimate question is whether counsel's 'representation fell below an objective standard of reasonableness.'" *Dyer v. Calderon*, 122 F.3d 720, 732 (9th Cir. 1997) (*citing Strickland*, 466 U.S. at 688). "We will neither second-guess counsel's decisions, nor apply the fabled twenty-twenty vision of hindsight." *Campbell v. Wood*, 18 F.3d 662, 673 (9th Cir. 1994) (en banc). Although we must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," *Strickland*, 466 U.S. at 689, "counsel must, at a minimum, *conduct a reasonable investigation* enabling him to make informed decisions about how best to represent his client." *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994) (*citing Strickland*, 466 U.S. at 691).

Second, "that the deficient performance prejudiced the defense." *Bonin v. Calderon*, 59 F.3d 815, 833 (9th Cir. 1995) (internal quotations and citations omitted). The prejudice component focuses on "whether counsel's deficient performance renders the result of the trial unreliable or the proceedings fundamentally unfair." *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). The test looks to whether there is a reasonable probability that without counsel's unprofessional errors the "result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

1. Failure to Investigate Eddie Nash.

Garceau offers evidence he contends was available at the time of trial, from Ace T. Karter and Jeffrey Sera, as well as from Nash himself, to establish that Garceau and Nash did not know each other. *See* Exs.

59, 67 and 62 to petition. This evidence purportedly impeaches the prosecution's theory for the murders, that Maureen was going to "snitch off" Garceau to Nash. Garceau argues the evidence would defeat the prejudicial impression of Garceau's association with Nash, which was "improperly exploited" by portraying Nash's reputation for violence.

The State notes that Nash himself denied knowing Garceau; the testimony of Mr. Karter and Mr. Sera lacks foundation, is speculative and inadmissable as improper opinion evidence; and in light of Nash's denial at trial that he knew Garceau, the proposed evidence was cumulative.

Ace Karter states he had known both Nash and Garceau for a number of years and declares he is "sure they did not know each other." Ex. 59:4. Jeffrey Sera, who committed burglaries with Garceau, never heard Garceau mention Nash, and does not "think [Garceau] knew Nash or was connected to him in any way." Ex. 67:1-2. Eddie Nash repeats his trial testimony, denies he knew Garceau and states he told the prosecutor before he testified that he did not know Garceau. Ex. 62:1.

The record belies Nash's credibility. Substantial evidence supports the jury's disbelief of Nash's denial he knew Garceau. That Garceau did know Nash was corroborated by testimony from Whittington and Susan, both of whom stated Garceau talked of Nash, more often after Garceau became involved with Maureen. RT-X:2592, RT-XI:2627, 2661, 2713 (Susan); RT-XI:2778-80 (Whittington). Ms. Christie saw Garceau at Nash's house during the period she lived with Nash and believed from the way Nash treated Garceau that he was doing business with Nash. RT-XII:3002-04.

Mr. Sera claims he was interviewed by a defense investigator prior to Garceau's trial, but was not called to testify. The State observes it was eminently reasonable for defense counsel not to call Mr. Sera, whose testimony about contact between Garceau and Nash was equivocal, cumulative to Nash's denial, and an opinion based on speculation. If Mr. Sera had testified, the fact that he and Garceau committed burglaries together would have been revealed. Mr. Sera's potential testimony was more prejudicial than probative.

Defense counsel strenuously argued Nash's denial he knew Garceau and vigorously sought to exclude the testimony of Judge Coen, Officer Sylvester and Ms. Christie, on the grounds the association

between Nash and Garceau was too tenuous, and such testimony was grossly prejudicial, outweighing its probative value. RT-XI:2735, 2737, 2740, 2744, 2765 and 2884. The trial judge disagreed. Even assuming counsel's performance was deficient for failing to locate and/or present the testimony of Mr. Karter and Mr. Sera, prejudice cannot be shown. In light of evidence presented at trial, the ambiguous and speculative opinions of Mr. Karter and Mr. Sera about Nash's knowledge of Garceau would not have substantially influenced the jury's verdict.

2. Failure to Investigate or Present Impeachment Evidence.

Garceau seeks to present evidence of Wayne James's January 1987 arrest in Kern County, to show James testified falsely when he said he was not in Kern County from June 1986 to May 1987. There was sufficient evidence attacking James's credibility to assure that this further inconsistency in James's testimony did not substantially influence the jury's verdict. Even assuming counsel's performance was deficient, there is no prejudice.

Garceau also seeks to present allegedly impeaching evidence that Shepard was charged in June of 1984 with aiding and abetting the flight of Michael Edward Marberry ("Mike") to avoid arrest and possession of a controlled substance and paraphernalia. Petition, Ex. 31 consists of copies of police reports and court documents concerning the attempted murder of Linda Marberry by her husband Mike. Mike was arrested at Shepard's apartment the same evening his wife was shot. Shepard was arrested for harboring a fugitive and charged with possession of drugs she had when taken into custody. The harboring charge was dismissed on June 8, 1984, after evidence at Mike's preliminary hearing was insufficient to show Shepard was involved in or had knowledge of the attempted murder. Shepard was admitted to a drug diversion program on July 3, 1984, and the drug charges against her were stayed.

At most, the evidence Garceau proffers shows that Shepard used drugs and was involved with a married man, not her husband. This evidence is no more damaging than admissions made by Shepard at trial. Shepard admitted living with Whittington, a married man, for four or five years, RT-X:2517, to lying to authorities, *id.*:2516, 2554, to deriving

her income from the drug business, *id.*:2546, and to allowing her apartment to be used for drug transactions. *Id.*:2505. The additional character evidence Garceau proffers is inconsequential and cumulative. Shepard's testimony about Garceau's confession to the murders of Maureen and Telesforo was corroborated by numerous other witnesses and physical evidence. There is no prejudice. Counsel was not deficient for failing to discover and/or present evidence of the 1984 charges against Shepard, nor would such evidence have substantially influenced the jury's verdict.

3. Failure to Investigate or Present Defense of Diminished Actuality.

Garceau offers trial counsel Stanley Simrin's declaration to establish his own ineffectiveness for alleged failure to conduct an appropriate investigation or consult with appropriate experts to make an informed decision to forego a diminished actuality defense. *See* Ex. 49. Mr. Simrin knew of Garceau's drug use at the time of trial, of cocaine's effects on mental functioning and behavior, and that Garceau's mental state was a potential defense and a potential factor in mitigation. *Id.*:3. Mr. Simrin retained a psychologist, David Marlow, as a consultant, although he did not inquire whether Dr. Marlow was qualified in the area of cocaine dependance. *Id.* Mr. Simrin did not investigate the extent of Garceau's drug use or its effect on his functioning or behavior, nor did he supply Dr. Marlow with background documentation of Garceau's drug use. *Id.* Mr. Simrin did elicit testimony from percipient witnesses about Garceau's drug use at the guilt phase. Based on this evidence, he sought to have the jury instructed regarding voluntary intoxication and diminished actuality. Ex. 49:4.[11]

Garceau seeks to present expert testimony from Dr. Craig Haney, Dr. David Smith, and percipient witnesses, about his abuse of cocaine, symptoms of post-traumatic stress disorder ("PTSD"), and deteriorating

---

11. *See* Claim S below.

mental condition.[12] It is unlikely the jury's verdict at the guilt phase would have been different had expert testimony of the effects of cocaine psychosis been presented, even with testimony of any effects military service had on Garceau, the verdict would not have been different in light of the evidence presented at trial of Garceau's conduct before and after the murders. Prejudice cannot be shown.

None of the proffered evidence shows Mr. Simrin provided ineffective assistance at the guilt phase. The defense asserted throughout the trial, and argued strenuously during closing, that the prosecution had not met the burden of proof because the evidence implicated the main prosecution witnesses, Whittington, Shepard, Susan and Codd, more than it implicated Garceau. This was a reasonable tactical choice in light of the limited physical evidence against Garceau and the problems inherent in a diminished actuality defense.[13] The decision not to spend

---

12. *See* declarations of experts, Exs. 48 and 50, along with declarations of percipient witnesses, Exs. 68 (Raymond Sucharski), 60 (George LePicard), 59 (Ace Karter), 66 (Walter Seifert), 71 (Whittington), 61 (Ronald Miller, Esq.), 72 (Shepard), 63 (Susan), 55 (Fabricant), 57 (Russell), 67 (Jeffrey Sera), 54 (Dalton), and 70 (Bill Whittington). The declarations of Whittington, Shepard, Susan and Russell are mainly consistent with their respective trial testimonies. Mr. Sucharski tells of the experiences he and Garceau had in Vietnam. Mr. Seifert and Mr. LePicard tell of their observations of Garceau's symptoms of PTSD. The remaining declarants, as well as Mr. LePicard, tell of Garceau's drug use and the effect such use had on his functioning and behavior.

13. The decision not to rely primarily on a diminished actuality defense (which essentially asserts that because Garceau voluntarily used large amounts of drugs for so long he did not realize what he was doing and should not be responsible), was reasonable, where another defense was available, since it was likely a diminished actuality defense would not favorably influence the jurors. *See* Claim B below.

scarce resources on contradictory defenses is tactical, not deficient performance. *Babbitt v. Calderon*, 151 F.3d 1170, 1174 (9th Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S. Ct. 1068 (1999). It is not ineffective for counsel to choose not to present evidence which contradicts the primary defense theory. *Correll v. Stewart*, 137 F.3d 1404, 1411 (9th Cir.), *cert. denied*, ___ U.S. ___, 119 S. Ct. 450 (1998).

Mr. Simrin elicited testimony at the penalty phase about Garceau's drug use from Garceau's brother Russell, his friend Starr Calliez, and attempted to humanize Garceau for the jury by showing his generous and caring nature. RT-1:143, 145, 147-50, 156-58. The legal standard of sufficient investigation is different for the penalty phase than for the guilt phase. *Hendricks v. Calderon*, 70 F.3d 1032, 1043 (9th Cir. 1995). Evidence of mental problems, although insufficient to establish a legal defense at the guilt phase, may be offered in mitigation at the penalty phase. *Id.* In *Hendricks*, counsel was found ineffective for failing to investigate and present evidence in mitigation of the defendant's "nightmarish upbringing and mental problems," as it was not possible this evidence could have prejudiced Hendricks. *Id.*

Here, evidence of Garceau's cocaine use and its effect on his behavior was not necessarily mitigating. Rather, the evidence was potentially prejudicial since his drug use was voluntary, he made his living manufacturing and trafficking in drugs, and knew the adverse effects drug use had on him. *See* Claim B below. The new drug use witnesses are cumulative to evidence presented at the guilt and penalty phases.[14] Mr. Simrin was not ineffective for failing to further investigate and present more evidence of Garceau's drug use. Substantial evidence proves Garceau's drug use was voluntary and that Garceau and those around him knew well the effect drugs had on him.

Garceau offers testimony from Jurors Briscoe, Gaines and Kalar that the drug use evidence that was presented had only "slight impact" on the verdict. *See* Exs. 53, 56 and 58 to the petition. Jurors may not

---

14. It was a reasonable tactical decision to utilize prosecution witnesses to present evidence of Garceau's drug use, based on the perception they had less bias in Garceau's favor.

testify to what effect any evidence has on their thought processes or how it influenced the verdict. Federal Rules of Evidence, Rule 606 (b). *See also*, California Evidence Code § 1150 (juror statements are inadmissible to show influence of evidence on a verdict) and California Penal Code § 1181[15/] (juror testimony admissible only to show objective misconduct, i.e., verdict by lot, consideration of non-admitted evidence). The proffered declarations improperly offer to show jurors' hypothetical impressions as to the effect such evidence would have had on their verdict. Such evidence is inadmissible.

4. Failure to Investigate or Present Evidence of Vietnam Experience and Post-Traumatic Stress Disorder.

Garceau proffers evidence of the long-lasting effects he suffered from his Vietnam experience, that he was certain he would be killed, and of his continuing symptoms of PTSD after his return. *See* Exs. 48 (Dr. Haney), 68 (Sucharski), 60 (LePicard), 59 (Karter) and 66 (Seifert).[16/]

Mr. Sucharski recounts experiences he shared with Garceau in Vietnam; that both of them thought they would not survive; and how they used alcohol and marijuana to block out the terror. Ex. 68. Mr. LePicard, Mr. Karter and Mr. Seifert all met Garceau after his return from Vietnam. Mr. LePicard states Garceau talked about being shot at and seeing people shot, and that he was "messed up emotionally" from his Vietnam experience. Ex. 60. Mr. Karter and Mr. Seifert frequently observed Garceau experience nightmares and wake up screaming and in a cold sweat. Ex. 66. Dr. Haney opines many of Garceau's actions, as revealed by Mr. LePicard, Mr. Karter and Mr. Seifert, are classic

---

15. Unless otherwise indicated, all statutory references are to the California Penal Code.

16. Garceau also presents statements by Jurors Briscoe and Gaines of the potential effect evidence of Garceau's military record would have had on the verdict. *See* Exs. 53 and 56. Juror statements of the effect of evidence upon the verdict are improper and not admissible.

symptoms of post-traumatic stress. Ex. 49:11-14. Dr. Haney concludes Garceau's drug dependance resulted from attempts to self-medicate the "emotional, cognitive, and behavioral problems" he was not equipped to solve on his own. *Id.*:16-17.

It was not deficient performance for Mr. Simrin to omit evidence of Garceau's Vietnam experience and subsequent symptoms of PTSD, since there is no evidence Mr. Simrin knew of the problems Garceau's friends now reveal. In *Babbitt v. Calderon*, 151 F.3d 1170, counsel was not ineffective for failing to investigate and present evidence of post-traumatic stress disorder, as it was cumulative of evidence already received and the defendant was reluctant to talk of it. *Id.* at 1176. Here, Mr. Simrin states he had no knowledge of Garceau's symptoms of PTSD, although he did know of his military service. There is no indication Garceau mentioned these symptoms to Mr. Simrin. It was reasonable for Mr. Simrin to focus investigation on areas which showed a potential benefit, especially in the absence of some indication of PTSD. Whatever his Vietnam experience, from his return until the time of the murders Garceau pursued an active criminal lifestyle manufacturing and trafficking in drugs that went far beyond drug abuse.

5. Failure to Investigate or Present Evidence of Drug Abuse.

Garceau asserts his alcohol and drug use began while he was in Vietnam, and escalated after his return. *See* Exs. 68 (Sucharski), 59 (Karter), 48 (Dr. Haney), 60 (LePicard), 71 (Whittington), 72 (Shepard), 63 (Susan), 55 (Fabricant), 57 (Russell), 67 (Sera), 54 (Dalton), and 70 (Bill Whittington). Garceau claims he suffered extreme psychological consequences from excessive drug use. He tenders expert opinion that his mental functioning was severely impaired and he suffered from a cocaine-induced psychosis at the time of the murders. *See* Exs. 50 (Dr. Smith), 48 (Dr. Haney) and 61 (Miller, Esq.).

Claim B reveals no prejudice from the failure to present additional percipient witness testimony, or expert testimony, at the guilt phase. The evidence of Garceau's words and actions before and after the killings gave the jury substantial evidence to conclude that Garceau was able to premeditate and deliberate the killings. He had motive and

opportunity, lived with the victims, and talked of the need to eliminate them as potential witnesses. It was not deficient performance for Mr. Simrin to focus on less prejudicial mitigating evidence at the penalty phase. Juror testimony about the effect of such evidence on the verdict is inadmissible.

6. Failure to Investigate or Present Readily Available Medical and Psychiatric Evidence in Mitigation.

Garceau offers to prove counsel was ineffective for failing to present the following available mitigation evidence: (1) a social and medical history and a determination of mental status, (2) effects of PTSD, (3) cocaine psychosis, (4) suicide and remorse manifestations, and (5) results of a competent mental evaluation to explain the conviction for Rambo's murder and the alleged kidnapping of Diane Sems. Garceau contends evidence of institutional failure and of his likely adjustment to prison should have been presented in mitigation. *See* Ex. 48 (Dr. Haney's social history), 52 (Belcher), 57 (Russell), 68 (Sucharski), 7 (military records), 8 (California Department of Corrections records), 66 (Seifert), 49 (Simrin), and 58 (Juror Kalar).[17/]

Dr. Haney's social history reveals: that Garceau sustained repeated beatings while in a juvenile institution; of the general harmful environment in Ohio Juvenile Facilities; that Garceau changed after Vietnam; of Garceau's post-traumatic stress disorder; of the effects of Garceau's drug use on his personality and behavior; and that Garceau's drug use was motivated as self-medication for stress.[18/] The beatings in

17. Juror Kalar's declaration is not admissible for this purpose.

18. Garceau presents the declaration of Jack Belcher, his school psychologist at the time he was incarcerated as a juvenile. Garceau was arrested for bringing a gun to school. Mr. Belcher states he believed Garceau was in an abusive home, and that Garceau said he needed the gun to run away from home. Ex. 52:1. Conversely, Garceau's brother Russell testified Garceau took the gun to school to show classmates a sample of his father's gun collection. RT-1:137. Russell gave no indication they came from an abusive home.

juvenile detention and Garceau's change after Vietnam were testified to by his brother Russell. RT-1:137-38, 139-40. The failure to present evidence of Garceau's Vietnam experience, symptoms of post-traumatic stress disorder, and the effects of and motivations for his drug use are discussed above.

Mr. Simrin's failure to present evidence of the general harmful environment of Ohio Juvenile Facilities when Garceau was incarcerated was not deficient performance. It is not clear that when Garceau was incarcerated the staff at his Ohio facility treated juveniles in a degrading manner, or that they were "hostile, indifferent, condescending or self-seeking." Ex. 48:9. Even assuming these facts were proved, their effect on the verdict is speculative. Garceau stayed out of trouble for about three years after his stay in the Ohio facility, and then served three years in the military with an honorable discharge. RT-1:136-39.[19/] No prejudice can be shown from Mr. Simrin's failure to present this evidence in mitigation.

Garceau also refers to California Department of Corrections documents from his incarceration in Monterey County for Rambo's murder. Ex. 8. These documents mainly focus on Garceau's suicide attempt, but do not provide insight into the motivation behind Garceau's actions nor constitute manifestations of remorse. The jury could have concluded the suicide attempt resulted from Garceau's consciousness of guilt for the conviction of Greg's murder four weeks earlier, not from

19. Garceau's military records, submitted in this proceeding, were not presented to the jury. This was a reasonable tactical choice by counsel as the military records included a juvenile conviction for fighting in 1962 (which occurred after the gun charge) and two violations of the military code in 1965, disobeying a lawful order of a superior and carrying a concealed weapon (knife), that were not disclosed to the jury. Ex. 7.

remorse. The mitigating value of these documents is minimal. The failure to present them was not deficient performance.

7. Failure to Adequately Investigate and Defend Against Charges in Aggravation.

Garceau refers to evidence, available at the time of trial, which he claims should have been offered to rebut evidence in aggravation: (1) the opinion of attorney Ronald Miller about the lack of evidence supporting the kidnapping charge, *see* Ex. 61, and (2) Fabricant's statement that the incident with Ms. Sems was not kidnapping, because she entered the truck voluntarily. *See* Ex. 55.

Mr. Miller represented Garceau against the kidnapping charge in 1982. He discovered an eyewitness, a gas station attendant, who saw the victim voluntarily depart with two men. Ex. 61:2. Mr. Miller asserts that after the prosecutor interviewed this witness, the kidnapping charges against Garceau were dismissed. *Id.* Mr. Miller interviewed the alleged victim, who said she voluntarily remained at the house with Garceau and Fabricant. *Id.*:3.

Fabricant declares Ms. Sems was his girlfriend at the time, that she called from a gas station and asked him to pick her up, and that she entered Garceau's truck voluntarily. Ex. 55:1-2. Fabricant states Ms. Sems went to the authorities to withdraw her complaint, saying she had not been kidnapped. *Id.*:2. The charges against Garceau and him were dismissed for lack of evidence. *Id.*

The prosecution called Ms. Sems to testify at the penalty phase. She explained Fabricant picked her up, blindfolded her, took her to an unknown house, forced her to take drugs and beat her. RT-1:53-56, 58-60. She testified they drove around in a truck for about an hour before going to the house, *id.*:54; that she was kept at the house for an indeterminate period of time, maybe four to five hours, *id.*:55, 60; and that she was not Fabricant's girlfriend at the time of the abduction. *Id.*:60. She escaped when Fabricant fell asleep on the couch and while the other people at the house were in the kitchen. *Id.*:55. She was unable in court to positively identify Garceau as the driver of the truck. *Id.*:57-59.

Fabricant was then called by the prosecution. Fabricant testified

he knew Garceau in 1982; that Garceau lived in Canoga Park at the time, but he did not know the name of the street; and Ms. Sems was Fabricant's girlfriend at the time. RT-1:61-62. LAPD Detective Quartararol interviewed Ms. Sems two days after the incident, at which time she identified Garceau from a photo line-up as the driver of the truck. *Id.*:63-65.

The jury heard Ms. Sems's detailed account of her abduction and treatment, which implicated Fabricant. Fabricant now denies there was an abduction and asserts Ms. Sems recanted shortly after she filed the police report. Ms. Sems's alleged recantation is explainable since victims of domestic violence often falsely recant, either from fear or from a misguided notion that they are helping their abuser. In light of her testimony at trial, Ms. Sems's alleged recantation was a credibility issue. Mr. Miller's opinion, an advocate's legal conclusion, is not helpful. The eyewitness could have misconstrued Ms. Sems's actions, interpreting them as voluntary when they were not. There is no indication of the distance of the eyewitness from the truck, nor whether the view was unobstructed. In light of trial evidence, Mr. Miller's statements are improper opinion and speculation.

8. Failure to Object to Prosecutorial Misconduct During Penalty Phase Closing Argument.

Garceau charges counsel was ineffective not to object, move to strike, or seek admonition for alleged instances of prosecutorial misconduct: (1) false and unreliable remarks regarding his future dangerousness, (2) improper remarks about Telesforo's status, (3) intentionally misleading the jury to consider mitigating evidence in aggravation, (4) to refuse to consider sympathy evidence, and (5) to give aggravating weight to the lack of mitigating psychological evidence. Mr. Simrin asserts there was no tactical reason for his failure to object.[20] Garceau proposes to call a *Strickland* expert to opine that counsel's

---

20. Mr. Simrin's declaration, however, does not mention the prosecutor's closing argument in the penalty phase, nor address any alleged failure to object. Ex. 49.

failure to object during closing was prejudicial. Such opinion testimony is a legal conclusion not helpful to resolve the claim. Fed. R. of Evid., Rule 702.

Nothing in the record or pleadings show Mr. Simrin's failure to object was not a tactical decision. To justify relief, the prosecutor's penalty argument must amount to prejudicial misconduct. Garceau argues the prosecutor's remarks about his future dangerousness were false and prejudicial. "The defendant's character, prior criminal history, mental capacity, background, and age are just a few of the many factors, in addition to future dangerousness, that a jury may consider in fixing the appropriate punishment." *Simmons v. South Carolina*, 512 U.S. 154, 162 (1994) (*citing California v. Ramos*, 463 U.S. 992, 1008 (1983) ("once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty . . . the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment.")).

Here, the prosecutor's comments on Garceau's future dangerousness were based on the evidence; the "cum file" of his 1972 prison records; the increasing violence of his crimes, from burglary to possession of illegal firearms to three murders. RT-1:171-74. He argued the evidence proved Garceau's indifference to human life and the gratuitous violence of the murders. *Id.*:174-76, 179. The argument of future dangerousness was based on legally admitted evidence, consistent with the "open and far-reaching argument" the Constitution permits. *People v. Davenport*, 41 Cal. 3d 247, 288 (1985) (*citing Gregg v. Georgia*, 428 U.S. 153, 203-04 (1976)).

Garceau complains of improper comment on Telesforo's status as a defenseless, vulnerable victim, contending there was no evidence supporting this speculative portrayal. Telesforo's photograph was admitted into evidence during the guilt phase. From this, the jury could make its own determination about Telesforo's age, physical size and condition. This was only a minor part of the prosecutor's argument. The prosecutor's repeated references to the jury's duty to consider all the evidence and to give it the weight they thought it deserved, made inconsequential the reference to Telesforo's vulnerability.

Garceau asserts the prosecutor mislead the jury by arguing that mitigating evidence should be considered in aggravation. The prosecutor

may argue for imposition of the death penalty and against mitigation. "Both the prosecution and the defense may present valid arguments as to the significance of the [sentencing factors] in a particular case." *Tuilaepa v. California*, 512 U.S. 967, 977 (1994). Competing arguments bring perspective to an issue and promote a reasoned decision. *Id. See also, People v. Fosselman*, 33 Cal. 3d 572, 580 (1983) (prosecutor may vigorously argue the case).

The prosecutor repeatedly directed the jury to the evidence and informed them it was their job to determine what weight to assign to any evidence. The prosecutor's argument that mitigating evidence was outweighed by evidence in aggravation was not improper. A prosecutor may lawfully argue that the mitigating evidence is entitled to little weight and is substantially outweighed by the aggravating factors. *People v. Jones*, 15 Cal. 4th 119, 184 (1997) (*citing People v. Cox*, 53 Cal. 3d 618, 683 (1991)), *overruled on other grounds by People v. Hill*, 17 Cal. 4th 800, 823 (1998). Nor is it improper for a prosecutor to characterize evidence offered in mitigation as aggravating. *Tuilaepa*, 512 U.S. at 977.

The prosecutor's argument regarding sympathy was not improper. He told the jury the decision was theirs alone, that they must be guided by the evidence, and that they could consider sympathy and mercy. RT-1:169-71. The prosecutor later argued the granting of any mercy should be limited by the evidence of the crime, asking how much mercy Garceau showed to Telesforo. *Id.*:180. This was not misconduct; such comment on the evidence was factually justified.

People v. Davenport, 41 Cal. 3d 247 (1985), held a prosecutor could not argue that the lack of evidence as to certain mitigating factors, subd. (d), (g) and (h) of § 190.3, rendered them aggravating factors.[21/]

---

21. The pertinent part of § 190.3 is as follows: ". . . (d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance. . . . (g) Whether or not the defendant acted under extreme duress or under the substantial dominion of another person. [¶] (h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his

Id. at 290. *People v. McDowell*, 46 Cal. 3d 551 (1988), addresses similar argument that a lack of evidence that the defendant was influenced by mental or emotional disturbance or affected by intoxication or mental disease, was a "factor in aggravation." *Id.* at 573-74. However, the error was harmless because the defense argued the contrary, the jury was properly instructed, and the jury was fully aware of the underlying facts and was free to place whatever weight it wished upon those facts. *Id.* at 574.

The record here shows the prosecutor did not argue the lack of mitigating evidence was a factor in aggravation. Although the prosecutor strenuously argued the evidence justified a death verdict, he repeatedly directed the jury to consider all the evidence, and told them it was their job to assign their own weight and values to the sentencing factors. There was no prosecutorial misconduct during closing argument; Mr. Simrin's failure to make unjustified objections was not deficient performance. Claim A is denied on the merits.

- Claim B - No Requisite Mens Rea for Murder

Garceau asserts his conviction and sentence are unconstitutional because he did not form the requisite intent for first degree murder due to his chronic cocaine use. Garceau claims freebasing cocaine for at least five years prior to the murders rendered the drug more addictive and had a greater impact on his mental capacity. Garceau contends he suffered from cocaine psychosis at the time of the murders and that he did not form the requisite intent for first degree murder.[22/]

---

conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication."

22. Factually related to this claim are subsections (3) through (5) of Claim A: Ineffective assistance of counsel for failure to investigate and present the defense of diminished capacity, failure to investigate and present evidence of Garceau's experience in Vietnam and of PTSD, and failure to

Before Garceau's trial, California abolished the defense of diminished capacity and limited the scope of psychiatric testimony. *See* §§ 22, 28-29.[23/] Evidence of mental illness "shall not be admitted to show or negate the *capacity* to form any mental state" but is "admissible solely on the issue of whether or not the accused *actually formed* a required specific intent." § 28(a) (emphasis added). Any expert in a criminal action "shall not testify as to whether the defendant had or did not have the required mental states" for the crimes charged. "The question as to whether the defendant had or did not have the required mental state shall be decided by the trier of fact." § 29. Evidence of voluntary intoxication is not admissible to negate the *capacity* to form any mental state, but is admissible "solely on the issue of whether or not the defendant *actually formed* a required specific intent." § 22 (emphasis added).

Garceau seeks to present expert testimony from Dr. Craig Haney and Dr. David Smith, Exhibits 48 and 50, as well as testimony from percipient witnesses,[24/] regarding his abuse of cocaine, symptoms of PTSD, and deteriorating mental condition. Dr. Smith observes, based on testimony provided by prosecution witnesses at trial, that Garceau smoked "significant amounts of cocaine over a period of years," commonly described as "acute toxicity with a pattern of chronic dependance." Ex. 50:6. Dr. Smith opines, based primarily on declarations by prosecution witnesses of Garceau's behavior, paranoia

---

investigate and present evidence of drug abuse, and Claim S: trial court error in denying a voluntary intoxication instruction.

23. In addition, § 188 was amended to narrow the definition of "malice aforethought." The prior definition included an awareness of the obligation to act within the general body of laws regulating society, and the capacity to act in accordance with such awareness. The amendment provides that once the trier of fact finds a deliberate intention to unlawfully kill, no other mental state need be shown. *See People v. Saille*, 54 Cal. 3d 1103, 1113-14 (1991).

24. *See* footnote 12 above.

and hallucinations, that Garceau suffered from a "cocaine-induced toxic psychosis." *Id.*:12. A person suffering from this type of psychotic state may "respond inappropriately to events which occur solely within the psychotic or delusional mental state of the individual." *Id.*:12-13. As a consequence of a psychotic state resulting from cocaine dependence, an individual may have "significantly impaired judgment and planning capacities, and a state of paranoia that can result in behavioral responses to perceived occurrences that have no basis in reality," behaviors which may be "irrational[] and/or violent[]." *Id.*:13. Dr. Smith concludes Garceau's documented history of drug use reveals cocaine dependence and consumption of sufficient quantities to "severely impair his mental functioning." *Id.*:3. Dr. Haney agrees with Dr. Smith's conclusions, that "the crimes resulted from a cocaine-induced psychosis that included strong elements of paranoia." Ex. 48:21.

Garceau contends cocaine psychosis prevented him from forming the requisite intent to commit first degree murder. Garceau asserts he is entitled to habeas relief, as the new evidence would probably produce an acquittal. The inquiry on habeas is whether the expert testimony, if presented to the jury, would have substantially influenced the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. at 623; *California v. Roy*, 519 U.S. 2, 4-5 (1996) (the *Brecht* standard of substantial influence on the verdict, taken from *Kotteakos v. United States*, 328 U.S. 750 (1946), is applicable on federal habeas review to trial errors). Federal habeas relief is warranted when newly discovered evidence bears on the constitutionality of the conviction and would probably produce an acquittal. *Swan v. Peterson*, 6 F.3d 1373, 1384 (9th Cir. 1993) (*citing Herrera v. Collins*, 506 U.S. 390, 399 (1993); *Harris v. Vasquez*, 949 F.2d 1497, 1523 (9th Cir. 1990)).

The proffered expert testimony of the effects of Garceau's cocaine use does not make it probable he would have been acquitted. California juries have found defendants guilty of first degree murder and/or have imposed the death penalty after hearing testimony detailing the effects of cocaine psychosis. *See e.g., People v. Breaux*, 1 Cal. 4th 281, 303 (1991) (finding of first degree murder after evidence of cocaine psychosis and expert testimony that defendant's mental state was inconsistent with premeditation); *People v. Visciotti*, 2 Cal. 4th 1, 32 (1992) (defendant guilty of first degree murder after evidence of cocaine

psychosis was presented and expert testimony stated he did not premeditate or deliberate the crime); *People v. Horton*, 11 Cal. 4th 1068, 1086 (1995) (death sentence returned despite expert testimony on cocaine psychosis and the effects of freebasing cocaine).

It can be fairly inferred from the verdicts that the jury believed the testimony of Garceau's colleagues with whom he used, trafficked, and manufactured drugs. Whittington's testimony covered the evening before the murders, and indicated Garceau was able to question and analyze his actions. "[Garceau] asked me if I thought he was just paranoid." RT-XI:2779. From this, the jury could conclude Garceau was not so affected by cocaine that he was unable to examine and evaluate his motives and conduct, negating the inference that his actions and mental state had no basis in reality. Garceau killed to eliminate "snitches" who he believed were potential witnesses against him, who could cause him problems. Immediately after the murders, Garceau recognized the need to dispose of the bodies and to remove evidence linking him with Maureen's apartment. This conduct demonstrates cognition and understanding of the consequences both before and after he acted. Evidence showed Garceau abhorred "snitches," based on his chronic, violent, criminal lifestyle. Expert testimony about cocaine psychosis would have further emphasized Garceau's long standing involvement with drug use, drug manufacturing and trafficking, and weapons.

Garceau improperly seeks to offer juror testimony to show the slight impact drug use evidence had on their verdicts. *See* Exs. 53 and 56 (declarations of Jurors Briscoe and Gaines). Jurors may not testify as to the effect evidence has on their thought processes or how evidence influences deliberations. Fed. R. of Evid., Rule 606 (b); Calif. Evid. Code §§ 1150 and 1181. The proffered declarations cannot be considered in this proceeding. Claim B is denied on the merits.

Claim C - Denial of Psychiatric Assistance

Garceau asserts he was denied reasonably competent psychiatric assistance at trial. David Marlowe, Ph.D. was retained by defense counsel to examine Garceau. Garceau contends Dr. Marlow unreasonably failed to competently or reliably evaluate his mental state,

failed to interview family members, obtain social history information, interview percipient witnesses, perform independent psychological, neurological or toxicological tests, diagnose cocaine psychosis or PTSD, or do any follow-up consultation with experts in these areas.

The State responds Garceau's claim is conclusory and not factually specific. The record demonstrates trial counsel consulted with and retained a mental health expert. The State contends requiring a review of the competence of psychiatrists would constitute a new rule, barred under *Teague v. Lane*, 489 U.S. 288 (1989).

Due process requires a state to provide access to competent psychiatric assistance when a defendant demonstrates that his sanity at the time of the offense will be a significant factor at trial. *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985). Garceau's trial counsel retained a psychologist to examine him. There is no evidence Garceau's access to psychiatric assistance was limited by the state or that the funding provided was insufficient. There was no credible ground for an insanity defense. Garceau's claim his psychologist was incompetent for not gathering background information is foreclosed by *Harris v. Vasquez*, 949 F.2d 1497, 1517-18 (9th Cir. 1990), which addresses the same claim raised here; refusing to expand *Ake* to encompass a "battle of experts." *Id.* (*citing Silagy v. Peters*, 905 F.2d 986, 1013 (7th Cir. 1990)).[25/] Claim C fails to state a claim under *Ake* and is denied on the merits.

Claim D - False and Misleading Testimony of Susan Rambo and Wayne James

Garceau complains his conviction was obtained through the use of uncorrected false and misleading statements, known to the prosecution and made by key prosecution witnesses, which were of such significance to affect the outcome of the trial, rendering his death

---

25. "Allowing such battles of psychiatric opinions during successive collateral challenges to a death sentence would place federal courts in a psycho-legal quagmire resulting in the total abuse of the habeas process." *Harris*, 929 F.2d at 1518.

sentence unreliable.

The first statement is Susan Rambo's, which allegedly deceived the jury into believing Susan received limited benefits for her testimony. Susan testified she did not have written immunity from Monterey County until the trial started. Garceau offers evidence that Susan's attorney, Bud Landreth, arranged a "no prosecution" agreement before she talked to the police and that Susan received other benefits which were not disclosed to the defense: she was kept in protective custody for one week, and the District Attorney's office intervened on her behalf in an investigation by Child Protective Services ("CPS").

Presentation of false evidence violates due process and requires a new trial. *Mooney v. Holohan*, 294 U.S. 103, 112 (1935). This is so even where the prosecution does not solicit the false information but only allows it to go uncorrected; *Napue v. Illinois*, 360 U.S. 264, 269 (1959), irrespective of the good or bad faith of the prosecution. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). To justify a new trial, the false evidence must be material, i.e., reasonably likely to affect the judgment of the jury. *Id.* "The principal [underlying *Brady*] is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted, but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Brady,* at 87.

There are two general claims under *Brady*: knowing use of perjured testimony, and failure to disclose exculpatory evidence. *United States v. Agurs*, 427 U.S. 97 (1976); *United States v. Bagley*, 473 U.S. 667, 678 (1985). The knowing use of perjured testimony is material "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Agurs*, at 103. This is equivalent to the *Chapman v. California*, 386 U.S. 18, 24 (1967) harmless error standard. *Bagley*, 473 U.S. at 679-80 n.9. *See also Napue v. Illinois*, 360 U.S. 264, 267 n.2 and 271-72 (1958) (finding the primary witness testified falsely, the prosecutor knew it, and the evidence was insufficient without the testimony; a new trial was required).

The failure to disclose exculpatory and impeachment evidence favorable to the defense is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a

probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1991). *Bagley* materiality is not a sufficiency of the evidence test. *Kyles v. Whitley*, 514 U.S. 419, 435 (1995). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* at 434.

Garceau is incorrect that the immunity agreement was not completely disclosed. There is no doubt that everyone, the parties, the judge and the jury, knew that Susan had been given immunity in return for her testimony, both in Monterey County and in Kern County. The prosecutor elicited this fact on direct examination, RT-X:2602, and Garceau's trial lawyer emphasized it on cross-examination. *Id.*:2706. Both immunity agreements were marked for identification as People's Exhibit number 39. CT-5:1157-63, 1173. Other evidence was presented to the jury which negatively impacted Susan's credibility. She admitted during her testimony to involvement with drug manufacturing, RT-X:2571-72, to filing a missing person's report after she was told her husband had been killed, RT-XI:2681, to allowing friends to hire an airplane and search the mountains for Greg, *id.*:2686, to calling Greg's answering machine several times (after she had gone to the house and turned the machine on) so friends would think she was looking for him, *id.*:2687-88, to having sex with Garceau, *id.*:2691, to using drugs, *id.*:2691-92, and to purchasing guns for Garceau, an admitted felon. *Id.*:2714.

Even assuming the truth of the assertions that Susan was in protective custody and that the District Attorney's office intervened for her in a CPS matter, such evidence, if it had been presented, was cumulative and unnecessary to further prove Susan was a cooperating, immunized witness who feared Garceau, received help from the prosecutor, and had made prior false statements. The jury had more than sufficient evidence to fairly judge Susan's credibility without the additional evidence Garceau offers. The results of the trial would not have been different if such evidence had been provided the jury. Evidence of substantial government benefits to Susan and her cooperating status were before the jury. No prejudicial error occurred which would have substantially influenced the jury's verdict. *Brecht*, 507 U.S. at 623.

The second statement is from Wayne James, described as a "last minute" witness. Garceau contends James testified falsely he had not been in Bakersfield for eleven months before his appearance at trial, because he was arrested on a gun charge in Bakersfield in January 1987. James testified he first talked to the prosecutor the day he arrived in Bakersfield from Las Vegas, one day before his testimony, and that the last time he was in Bakersfield was in June of 1986. RT-XII:3202-03. The exhibits Garceau submits show the charges associated with James's January 1987 arrest were dismissed. Exs. 46:4, 47:2. They do not prove James was in Kern County during January of 1987 for any longer than the day he was arrested.

Garceau does not indicate how or why the prosecution knew James's testimony was false. The disclosure requirement of *Brady* and its progeny obliges the prosecution to learn of any exculpatory evidence known to others acting on the government's behalf, which includes law enforcement personnel. *Kyles v. Whitley*, 514 U.S. 419, 436-38 (1995). The same standard is not specifically extended to impeaching testimony.

The alleged undisclosed evidence goes only to collateral impeachment of James's credibility, and is not material to either guilt or penalty as required by *Brady*. 373 U.S. at 87. Even assuming the prosecutor should have known of James's January 1987 arrest and corrected his testimony about not being in Kern County before the trial, the evidence is inconsequential to the jury's judgment. The jury had more than sufficient evidence to judge James's credibility. James admitted he manufactured drugs with Garceau, RT-XII:3185; he sold and used drugs, *id.*:3186, 3188-89; and he was well-known by Kern County law enforcement under the moniker, "Fast Lane Wayne." *Id.*:3194. James testified he was "in shock" when he heard of Rambo's murder, but had a cavalier attitude about the murders of Maureen and Telesforo. *Id.*:3185 ("since Maureen was going to snitch on [Garceau], he did what he had to do"). Such adverse evidence about James bolsters confidence in the verdict. No error occurred which would have substantially influenced the jury's verdict. *Brecht*, 507 U.S. at 623. Claim D is denied on the merits.

Claims E, F, and G - Excessive Security and Presence of

Television Crews

Claim E contends Garceau's shackles and handcuffs at the preliminary hearing impaired his ability to assist counsel, and the heightened security measures at trial unfairly conveyed an impression of dangerousness and guilt which prejudicially influenced the jury. The specific actions referenced are: the use of metal detectors for witnesses and the audience; the presence of three uniformed guards in the courtroom in addition to the bailiff; the presence of plainclothes officers; the presence of a guard with a metal detector during voir dire; and subjecting prospective witnesses to pat-down searches. Garceau contends these actions unfairly conveyed the impression he was dangerous and presumptively guilty, and were based in part on the assertion he was a member of the Hell's Angels motorcycle group.

The State rejoins Garceau has provided no evidence his communication with counsel was impaired by his restraints at the preliminary hearing. The claim lacks factual support and no prejudice is shown. The sheriff submitted evidence to support the additional security during the preliminary proceedings approved by the trial judge. RT-1:25-58, 74-76 (1986 proceedings); RT-2: 54-56. The State alleges the security measures were reasonable, unobtrusive and appropriate.

Juror declarations submitted in support of this claim do not show the security measures were excessive. Juror Briscoe observed the bailiffs appeared to be wearing "flack jackets" when Nash testified. Ex. 53. Juror Gaines saw Whittington outside the courtroom in shackles. Ex. 56.[26] Unjustified shackling impacts a defendant's constitutional rights when viewed by the jury, by "creating an inherent danger that the jury may form the impression that the defendant is dangerous or untrustworthy." *Rhoden v. Rowland*, 172 F.3d 633, 636 (9th Cir. 1999) (*citing Holbrook v. Flynn*, 475 U.S. 560, 568-69 (1986)). Where the jury did not see the shackles, any error may be harmless. *Rhoden, id.* Garceau's shackles at the preliminary hearing could not have prejudiced

---

26. Juror Kalar stated he saw Garceau in court in shackles, but this observation is not supported by the evidence. Ex. 58.

him; no jurors were present. Most prisoners in state and federal trial courts are shackled during pre-trial court appearances. Garceau does not specify how shackles at the preliminary hearing kept him from communicating with his attorney or what information he was unable to impart to counsel. There is no evidence his constitutional right to assistance of counsel was impaired by pre-trial shackles.

A federal court reviewing a claim of excessive security can only look at the scene to determine whether it was inherently prejudicial so as to impact a defendant's right to a fair trial. *Holbrook*, 475 U.S. at 572. The presence of guards can cause reasonable inferences other than the defendant was dangerous or culpable. *Id.* at 569. "Our society has become inured to the presence of armed guards in most public places." *Id. See Ainsworth v. Calderon*, 138 F.3d 787, 797, amended on other grounds by 152 F.3d 1223 (9th Cir. 1998) (six deputies, two at the courtroom entrance and two for each defendant were not inherently prejudicial); *King v. Rowland*, 977 F.2d 1354, 1358 (9th Cir. 1992) (upholding three armed guards for a single defendant); *Morgan v. Aispuro*, 946 F.2d 1462, 1465 (9th Cir. 1991) (security measures are common in government buildings, measures here did not restrain or separate the defendant, no reason for the jury to infer the defendant was the specific reason for the security).

Garceau does not show how the security measures employed at his trial were inherently or actually prejudicial. The trial judge limited uniformed, armed guards to three plus the bailiff, instructed that any additional officers be in plainclothes in the audience or outside the courtroom, and stated Garceau was not to be handcuffed or shackled in the presence of the jury. RT-2:54-56. The judge also took steps to physically separate the jury, thus insulating them from the security procedures. *Id.* There is no indication the jury's view of Garceau was negatively impacted by the additional security. Even assuming the security measures negatively impacted the jury, any error was harmless considering the overwhelming evidence of Garceau's guilt, and that he and trial witnesses were security risks. Claim E is denied on the merits.

Claim F alleges the presence of television cameras in the courtroom during the testimony of certain witnesses violated Garceau's constitutional rights. Witness Patricia Shepard, when asked to show how Garceau demonstrated stabbing the victims, asked, "The cameras

have to be here?" RT- 2509. Trial counsel requested the television crews be prevented from entering and exiting the courtroom during the examination of witnesses to prevent the appearance of editorializing for the jury. RT-2441-42. This request was denied. RT-2442. Further, Garceau asserts the judge failed to stop conferences and interviews by the television crews, after trial counsel advised this was occurring in the hallway, and did not inquire about any resulting impact on the jury. RT-2527.

The State rejoins that Ms. Shepard testified in front of the television cameras without concern or hesitation until she was asked to re-enact Garceau's depiction of stabbing Maureen and Telesforo. The State opines her request not to be on camera arose from sensitivity about re-enacting the scene, not from any feeling of intrusiveness. The State contends the trial judge did ask the jurors if they had inadvertently heard or read anything about the case after defense counsel complained of television interviews being conducted in the hallway. Only one juror related an incident at her job. No juror mentioned any exposure to the media presence at the courthouse. The State argues Garceau has failed to show prejudice from the presence of the television crews.

Sheppard v. Maxwell, 384 U.S. 333 (1966) held that due process requires "trial by an impartial jury free from outside influences. . . . [but] there is nothing that proscribes the press from reporting events that transpire in the courtroom." At 362-63. Sheppard's conviction was reversed, prejudice was presumed from pervasive media interference during the trial, which among other things, impaired his communication with counsel when reporters were seated inside the bar; reporters repeatedly revealed evidence detrimental to Sheppard which was never presented at trial; reporters invaded the courthouse so that "bedlam reigned" and the participants in the trial were continually hounded; jurors' names, addresses and pictures were published before the trial, turning them into celebrities. The judge made no attempt to control the media's influence at Sheppard's trial, did not admonish the jury not to read or listen to news reports, refused to question jurors about several inflammatory news reports, and ignored the impact of the media's takeover of the court facility. Nothing in Garceau's trial comes close to the "carnival atmosphere" decried in *Sheppard*. Garceau has not presented evidence that his jury was improperly influenced by media

coverage at his trial. Claim F is denied on the merits.

Claim G contends the increased security measures and intensified media presence during the testimony of Eddie Nash and Judge Ronald Coen conveyed an importance to the jury which was false and prejudicial. Mr. Simrin declares the testimonies of Nash and Judge Coen were accompanied by a significant increase in security and by frenzied media activity, including the presence of television cameras. Ex. 49:5. Mr. Simrin asserts Nash and Judge Coen entered the courtroom surrounded by guards, and the audience increased from about two people per day[27] to a packed courtroom. *Id.* Juror Briscoe declares he disregarded Nash's testimony, which denied association with Garceau or Maureen, because the judge admonished Nash several times. Ex. 53. Juror Gaines states Garceau's conviction was based on some connection between Garceau and Nash, however, he declares the information presented about Nash seemed irrelevant. Ex. 56. Juror Kalar declares he believed there was a connection between Nash and Garceau, based on the testimony of the co-conspirators. Ex. 58. These juror statements are improper and cannot be considered under federal or state evidence law.

Garceau argues additional media attention and heightened security unduly emphasized the testimony of Nash and Judge Coen. This ignores the testimonies of Larry Tom Whittington, Susan Rambo, and Michele Christie, all of whom described the association between Garceau and Nash. *See* RT-XI:2778-80 (Whittington); RT-X:2593, RT-XI-2627, 2661, 2713 (Susan); RT-XII:3002-04 (Ms. Christie). As in Claim A(1) above, there is no prejudice since there was sufficient evidence upon which the jury could find a connection between Nash and Garceau, despite Nash's denials. Claim G is denied on the merits.

Claim H - Discriminatory Use of Peremptory Challenges

Garceau seeks to present evidence that at the time of his trial the Kern County District Attorney's office had a pattern and practice of

---

27. The absence of an audience during the majority of the trial belies the claim of inordinate media attention and publicity.

using peremptory challenges against Hispanics.

Garceau argues there was prima facie *Batson*[28] error and the prosecutor's explanations for challenges were contrived to conceal discrimination. The trial judge found no prima facie *Batson* error because Hispanic men and non-Hispanic women remained on the jury, which impliedly fails to recognize Hispanic women as a separately cognizable group.[29]

Garceau's first *Batson* challenge claimed wrongful exercise of five of the prosecution's first twelve peremptory challenges to excuse women with Hispanic surnames. RT-X:2250. The court found three Hispanic males and one Hispanic female remained on the panel, and ruled Garceau had not shown a prima facie case. *Id.*:2252-54. The trial judge reviewed transcripts and held he was "not of the opinion that the district attorney has systematically excluded a minority from the jury." *Id.*:2254. Immediately following the denial of the motion, the prosecutor exercised the next peremptory challenge against the remaining Hispanic female on the jury. RT-X:2254. Garceau renewed his motion. *Id.*:2255. The court ruled that because four Hispanic males and five non-Hispanic females remained on the panel, "it does not appear . . . that a prima facie case of discrimination has been shown," *id.*, and denied Garceau's motion. *Id.*:2256. The following day, the prosecutor requested and was allowed the opportunity to put on the record the reasons for exercising peremptory challenges to the Hispanic women in the jury box. *Id.* at 2284-93. Garceau complains about the

---

28. *See Batson v. Kentucky*, 476 U.S. 79, 96-97 (1986); *People v. Wheeler*, 22 Cal. 3d 258, 280 (1978). *See also Powers v. Ohio*, 499 U.S. 400, 409, 415 (1991) (holding a defendant who is not a member of the minority class may still assert a *Batson* equal protection challenge).

29. This finding, and the prosecutor's subsequent explanation, are subject to deference on review, as they are based on facts that play out in front of the trial judge. *Tolbert v. Page*, ___ F.3d ___, 1999 WL 427449 (9th Cir. June 28, 1999) (en banc).

prima facie *Batson* error ruling, and calls the prosecutor's explanations belatedly contrived to cover up discriminatory strikes. The record reveals support for the prosecutor's explanations. The trial judge stated that even if the ruling about prima facie *Batson* error was wrong, the prosecutor's explanations were persuasive. *Id.*:2294.

Garceau contends the California Supreme Court found that Hispanic women qualify as a cognizable group. *See People v. Garceau*, 6 Cal. 4th 140 (1993). This is incorrect. "[W]e assume that defendant is correct in asserting, without challenge by the People, that Hispanic-surnamed women constitute a 'cognizable group' under *Wheeler*." *Id.* at 171 (emphasis added). The California Supreme Court, after reviewing the entire voir dire record, found Garceau had "failed to show a 'strong likelihood' that these prospective jurors were excluded because of group association." *Id.*

1. Did the Trial Court Err in Finding No Prima Facie Case Regarding Hispanic Women?

Turner v. Marshall, 63 F.3d 807 (9th Cir. 1995), involves a similar challenge. Turner, an African-American defendant, argued the prosecution violated *Batson* by using five out of nine peremptory challenges to exclude African-Americans (three men and two women) from the jury. At the time of Turner's motion, four African-American women remained on the jury. The trial judge found no "pattern of individualized discrimination." *Id.* at 811.

> "Because African-American women remained on the jury, Turner focuses on the exclusion of black men as the basis for a *Batson* violation. However, neither the Supreme Court nor the Ninth Circuit has recognized that the combination of race and gender, such as 'black males,' may establish a cognizable group for *Batson* purposes. *See United States v. Changco*, 1 F.3d 837, 839 (9th Cir. 1993) (declining to address whether 'minority women' are an identifiable class). In fact, the two circuits that have addressed this issue have held that a defendant may not seek *Batson* relief on the basis of

> exclusion of 'black men' or 'black women.' *See United States v. Nichols*, 937 F.2d 1257, 1262 (7th Cir. 1991); *United States v. Dennis*, 804 F.2d 1208, 1210 (11th Cir. 1986)."

Id. at 812. Here, the ruling that Hispanic women were not a separately cognizable group to support *Batson* error did not violate Garceau's federal constitutional rights.

2. Were the Challenges Sufficient to Show Discrimination of Hispanics in General?

"Regardless of the final racial makeup of the jury, the exclusion of a single minority juror on account of race would constitute a *Batson* violation." *United States v. Bishop*, 959 F.2d 820, 827 (9th Cir. 1992). In *Turner*, the exclusion of African-Americans as a group raised an inference of discrimination, since five of a possible nine African-American venire-persons could establish a pattern of discrimination. *Id.* at 812-13. *Turner* considered the percentage of strikes compared to the venire composition. An inference of discrimination is raised when the percentage of challenges against minorities is disproportionately higher than the percentage of the minority in the venire. In *Turner*, the venire was composed of approximately 30 percent African-Americans and the prosecution challenged 56 percent. *Id.* at 813.

Here, the venire (after excuse for hardship and cause) was 25.5% Hispanic (12 of 47). The prosecution peremptorily challenged 19 persons, 5 (26.3%) of whom were Hispanic women. The defense peremptorily challenged 12 persons, 4 (33.3%) of whom were Hispanic men. The jury and alternates selected contained 3 Hispanic men. The percentage of Hispanics challenged by the prosecution compared to the total number available was only marginally higher.

Turner considered whether all of the challenged group had been excused from the venire: "The fact that the prosecutor did not attempt to remove all African-American jurors weighs against Turner's claim, but it is not dispositive." *Id.* "[T]he state trial judge may have impermissibly relied on the fact that African-Americans and other

minorities remained on the jury, without considering other factors." *Id.* at 814. Here, that Hispanics remained on the jury is not dispositive.

The record in *Turner* did not show the judge considered the prosecutor's questions and statements during voir dire, the venire-persons' responses, or any other factors. *See United States v. Battle*, 836 F. 2d 1084, 1085 (8th Cir. 1987) (noting all relevant circumstances should be considered, including a pattern of strikes, questions and statements by prosecutor during voir dire). *Turner* found no bias in the prosecutor's questions.

Here, the prosecutor excused potential jurors Najera and Chavez, both of whom indicated tacit approval of drug use, while no other potential juror held similar views. RT-VI:1028 (Najera), RT-VII:1519-21 (Chavez). Juror Briscoe's ex-husband used drugs, but not until after they were divorced. RT-V:825. Juror Puckett gave up on his marriage because of his wife's drug use. *Id.*:803-04.

The prosecutor also excused potential jurors Asuncion and Martinez, who were confused during voir dire questioning. Mrs. Asuncion had difficulty with the concepts of reasonable doubt and credibility. RT-VIII:1669-71, 1690-91. She would require the prosecutor to prove the case totally so there were no "maybes." *Id.*:1666. Later she explained "maybe" was something tied to the evidence. *Id.*:1691. Ms. Martinez's responses were inconsistent and confused. RT-VII:1446, 1448-49, 1456. First she said death was appropriate for "brutal crimes," *id.*:1446, then that she thought life without parole was preferable to death but could not say why she thought so, *id.*:1447, then defined all first degree murder as "brutal." *Id.*:1454-56. Juror Munoz, by comparison, was confused by confusingly framed questions. *Id.*:1416-17, 1425-26, 1433-36. Juror Bittle became confused by trying to answer before the entire question was asked. RT-IX:2228-29, 2240-42.

Potential juror Vasquez was excused for her continued attempts to obtain a hardship release. First, during hardship examination, she stated there was no substitute available for her position at work, that her students would suffer in her absence, and that her husband was on disability. RT-III:213-18. During questioning on death qualification and for cause, she stated she was enrolled in a computer class that had started the previous Wednesday which would continue for 4 more weeks at 3:00

p.m., and was in a bilingual education class on Tuesdays at 3:00 p.m. that would extend until June. RT-IV:360-96. Her hardship claims were denied, she was passed for cause and seated on the panel at No. 12. RT-VI:1228. More than 3 weeks later she submitted a hardship letter from her employer and complained of problems transporting her daughter from home to school. RT-X:2249. By comparison, Juror Gaines stated during hardship questioning that the 130-mile round trip from home would be a burden; RT-III:129-30, on recall stated his employer would be in a bind if he was chosen; *id.*:204-05, but during questioning on death qualification and for cause made no further attempt to be excused. RT-VIII:1737-1760. The reasons given by the prosecutor for peremptory challenges, especially in light of Ms. Vasquez's extreme efforts to avoid service, are non-discriminatory, valid and fully supported by the record.

Garceau claims the Kern County District Attorney's office practiced discriminatory challenges on the basis of race and gender in violation of the Equal Protection Clause of the Fourteenth Amendment. Garceau offers the belated opinion of trial counsel, Mr. Simrin, based on his twenty-five years of criminal defense work in Kern County. Mr. Simrin opines the reasons offered by the prosecutor for the peremptory challenges were an attempt to cover up bias based upon race and gender and that this was a "well-established practice based on unfounded assumptions, stereotypes, and discriminatory attitudes of other parts of the community, including the staffing of the District Attorney's office." *See* Exs. 49 and 27. There is no excuse for the delay in raising this claim.

Garceau also seeks to call David Rivera, Esq., Kern County Deputy Public Defender from October 3, 1983 to March 16, 1990, and H. A. Sala, Esq., a criminal defense lawyer in Kern County from 1984, who will testify similarly to Mr. Simrin. *See* Exs. 64 and 65. Mr. Sala accuses the Kern County District Attorney's office of engaging in a conscious and planned strategy to strike jurors based on race. *See* Ex. 65. Garceau also seeks to present testimony from two of the challenged jurors, Asuncion and Vasquez, that they have served on other juries and "denying" the prosecutor's reasons for excusing them. *See* Exs. 51 and 69.

The state record shows there were valid, nondiscriminatory

reasons for the peremptory challenges exercised by the prosecution. The opinions of Mr. Simrin, Mr. Rivera and Mr. Sala are untimely, partisan subjective views, not easily corroborated fifteen years later, which should have been presented in the trial court. Mr. Simrin made no objection to the panel generally, nor did he file a pretrial motion to challenge the District Attorney's alleged biased jury selection practices to seek the judge's intervention in limine during jury selection. No published court decisions, empirical studies, or statistics of the racial composition of Kern County jury panels, trial juries or jury selection practices are offered. Even if such alleged discriminatory jury selection practices existed in the Kern County District Attorney's office, no objective evidence shows it impacted Garceau's trial.

The testimony of the potential jurors, Mrs. Asuncion and Mrs. Vasquez, is inadmissable. Their speculation about the prosecutor's reasons for excusing them from service, does not negate credible and lawful reasons offered, which are supported by the record. Under *Batson*, once a lawful reason for a challenge is offered and accepted by the trial judge, the inquiry as to the specific juror ends. *United States v. Gillam*, 167 F.3d 1273, 1278 (9th Cir. 1999) (*Batson* does not require specific findings by the trial judge and only requires the prosecutor's explanation to be facially valid, not persuasive or even plausible). Attempts to offer post hoc explanations of their voir dire responses years later in no way undermines the validity of the prosecutor's interpretation and perception of the jurors' answers at the time. Claim H is denied on the merits.

Claim I - Improper Cause Exclusion of Anti-Death Prospective Juror

Garceau asserts he was denied his right to an impartial jury under *Wainwright v. Witt*, 469 U.S. 412 (1985), when potential juror Cathy Wilken was excluded for cause on the ground she was opposed to the death penalty. Garceau asserts Ms. Wilken's responses did not indicate inability to serve, but instead evidenced her understanding of the gravity of the determination she would be asked to make. Garceau claims Ms. Wilken was not questioned as to whether her feelings would affect her ability to follow the law, and that she implied she could vote for death

for compelling reasons.

The State responds Ms. Wilken was properly excused under *Witt* as her views substantially impaired her ability to serve due to her bias against the death penalty, which would influence her judgment. She did not think she could impose a death sentence. The State acknowledges Ms. Wilken's responses did not make it unmistakably clear she could never impose a death sentence, but "unmistakable clarity" need not be shown. *People v. Guzman*, 45 Cal. 3d 915, 956 (1988). The trial judge was in the best position to evaluate Ms. Wilken's demeanor and her answers on voir dire. Under *Witt*, prospective jurors may be excluded for cause when their views on capital punishment would prevent or substantially impair the performance of their duties as a juror in accordance with the instructions and their oath. 469 U.S. at 424. The trial judge's finding regarding a potential juror's state of mind is a finding of fact subject to the presumption of correctness in 28 U.S.C. § 2254(d). *Id.* at 428-29.

The record shows the dismissal of Ms. Wilken was not an abuse of discretion. Ms. Wilken's lack of certainty that the death penalty was ever appropriate, combined with her admitted bias against the death penalty "that would influence [her] judgment," RT-IX:2067, sufficiently supports the judge's finding she would be unable to perform her duties as a juror as required by *Witt*. The California Supreme Court, on direct review, agreed the trial judge's finding was supported by the record. *People v. Garceau*, 6 Cal. 4th 140, 175 (1993). Garceau has not rebutted the presumption of correctness given the trial judge's finding. Claim I is denied on the merits.

Claim J - Cumulative Error in Jury Selection

Garceau argues the cumulative effect of errors asserted in Claims H and I denied him an impartial jury under *Gray v. Mississippi*, 481 U.S. 648, 658 (1987). In *Gray*, a juror stated twice that she could impose the death penalty, but was excluded for cause. Her exclusion could not be harmless error, as an impartial jury goes to the integrity of the legal system. *Id.* at 668. Here, the excluded juror was unable to say she could impose the death penalty, and in fact admitted her bias against the penalty would influence her decision. The record discloses valid,

nondiscriminatory reasons for peremptory challenges exercised to strike certain Hispanic women on the panel. Garceau was not deprived of an impartial jury. Neither Claim H nor Claim I have any merit; there is no cumulative error. The California Supreme Court found no such error. *Garceau*, 6 Cal. 4th at 175. Claim J is denied on the merits.

Claim K - Erroneous Denial of Section 352 Motion

Garceau challenges denial of his motion to exclude or strike the testimony of Nash, Officer Sylvester, Judge Coen and Ms. Christie as irrelevant under Cal. Evid. Code § 210, or unduly prejudicial under § 352, violated his constitutional rights. Garceau alleges Nash's testimony about prior criminal acts and testimony about Nash's reputation for violence and criminal activity from Officer Sylvester and Judge Coen rendered the trial fundamentally unfair. Nash testified he did not know Garceau, Maureen or Ms. Christie, which he affirms in a current declaration. Garceau characterizes Ms. Christie's testimony, that she previously saw Garceau and Maureen at Nash's house, as unreliable due to her drug use.

Garceau argues absence of a connection between him and Nash makes the challenged testimony inadmissable to prove motive or state of mind and that the testimony invited jury speculation: (1) that some association existed in the past and continued; (2) that Garceau was afraid of Nash; (3) that Garceau had some reason to fear a violent reprisal from Nash; and (4) that Maureen was killed to prevent such an eventuality, because no direct evidence supported these assumptions. The challenged testimony is said not to corroborate Whittington's testimony that Garceau said Maureen was going to "snitch," or tried to call Nash's lawyer or a prosecutor. Garceau recognizes Ms. Christie's testimony corroborates Whittington's testimony that Garceau said Maureen used to "run with" Nash. This testimony, in conjunction with the heightened security measures, Claims F and G, is said to have resulted in a penalty based on emotion and guilt by association.

Garceau complains the trial court's failure to document findings on the Section 352 motion abused discretion, because the challenged testimony impacted the jury and "imbued the proceedings with a heightened aura of lurid underworld crime." Garceau describes the testimony as inflammatory and irrelevant circumstantial evidence presented by witnesses who "admittedly gave perjured testimony" at

previous hearings, lied to law enforcement, and harbored as compelling a reason to murder the victim as Garceau.

The State rejoins that the challenged testimony was relevant to motive and corroboration; any prejudice was cured by the limiting instruction given; and the challenged testimony was mitigating. The State argues the trial judge weighed and properly rejected defense counsel's arguments on the issue of probative value versus prejudice.

"While a petitioner for federal habeas relief may not challenge the application of state evidentiary rules, he is entitled to relief if the evidentiary decision created an absence of fundamental fairness that 'fatally infected the trial.'" *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 897 (9th Cir. 1996), *citing Kealohapauole v. Shimoda*, 800 F.2d 1463, 1465 (9th Cir. 1986). A petitioner must overcome the presumption of correctness due the trial court's finding the evidence was probative and not unduly prejudicial. *Id.*, citing 28 U.S.C. § 2254(d).

Federal courts have no authority to review claims that a state's evidentiary rules were violated, but can only determine if the admission of evidence rendered the trial so fundamentally unfair as to violate due process. *Windham v. Merkle*, 163 F.3d 1092, 1103 (9th Cir. 1998); *Jammal v. Van de Kamp*, 926 F.2d 918, 919 (9th Cir. 1991); *Reiger v. Christensen*, 789 F.2d 1425, 1430 (9th Cir. 1986). Even if evidence was admitted in violation of a state rule of evidence, due process is not violated unless the evidence is "of such quality as necessarily prevents a fair trial." *Windham*, 163 F.3d at 1103 (*citing Kealohapauole*, 800 F.2d at 1465).

The California Supreme Court found the challenged testimony entirely relevant to Garceau's motive for killing Maureen and Telesforo. *See Garceau*, 6 Cal. 4th at 177. Any prejudice from the challenged testimony was avoided by the trial court's limiting instruction to the jury. *Id.* at 178-79. The trial judge's failure to make a more specific finding regarding Garceau's Section 352 motion is a matter of state law and in no way impacts the fairness of the trial. The challenged evidence presented a classic credibility conflict as to each witness, which the jury resolved. The testimony directly bore on Garceau's unmitigated criminality, permeated with his continuous involvement in drug use, manufacture and trafficking, weapons, and violence. Claim K is denied on the merits.

Claim L - Erroneous Admission of Garceau's Statement

Garceau asserts his statement to the Monterey County District Attorney Investigator, Richard Lee, should not have been admitted. When Lee told Garceau he would first be sent to Kern County for trial, Garceau responded, "That was a stupid thing to do . . . they can only gas me once. They can only take my wheels one time. Do you know what I mean?" RT-XII:3352. Lee said, "Come on, Bob, that's negative vibes." *Id.* Garceau said, "Yeah, negative vibes, that's right. They can only – I'm still breathing and there's a few people who ain't." *Id.*

Garceau contends Lee's testimony was inadmissable hearsay, or arguendo, if an admission, irrelevant, because his statements were ambiguous, only acknowledging others were dead. Garceau perceives a substantial risk that the guilt and penalty verdicts were based on the unreasonable inference his statements to Lee were confessions.

The State notes failure to object at trial means the claim was not preserved. Garceau's statements were admissible as evidence of consciousness of guilt, without invoking a hearsay exception for the truth of the matter asserted; i.e., the statements were not offered to prove people were dead, but rather admitted culpable recognition of the magnitude of his crimes. The State contends only a guilty person would resort to such morbid sarcasm while incarcerated for murder.

The California Supreme Court found Garceau's statements to Lee were not hearsay, were not offered for their truth, but as evidence showing consciousness of guilt. The statements also reflected Garceau's callous disregard for human life, his malignant heart, and his disdain for the justice system. The admission of Garceau's statements to Lee did not violate due process as the evidence was not "of such quality as necessarily prevents a fair trial." *Windham*, 163 F.3d at 1103. Claim L is denied on the merits.

Claim M - Erroneous Admission of Highly Inflammatory Evidence

Garceau describes two photographs, four tissue samples and Maureen's upper and lower jawbone as highly inflammatory evidence which denied him a fair trial. The photographs, People's Exs. 5 and 19,

showed the decomposing bodies as they were removed from the dresser and Maureen's chest with decomposing bone matter.

Garceau argues the evidence, (1) was not relevant to any issue in the case, as the issue concerning the manner of death was not in dispute, (2) was highly prejudicial and inflammatory, (3) was cumulative, and (4) if relevant, should have been excluded as more prejudicial than probative. Garceau suggests the sole purpose for the photographs was to appeal to emotion.

The State responds that contemporary jurors are sophisticated, inured by media coverage of gruesome and shocking events, and desensitized to cruel and unusual homicides. "The average juror is well able to stomach the unpleasantness of exposure to the facts of a murder without being unduly influenced. The supposed influence on jurors of allegedly gruesome or inflammatory pictures exists more in the imagination of judges and lawyers than in reality." *People v. Lang*, 39 Cal. App. 3d 680, 689 (1974), *cited with approval by People v. Jackson*, 28 Cal. 3d 264, 302 (1980).

The photographs were not unduly gruesome, showed the circumstances of the crime, and corroborated Whittington's testimony about disposal of the bodies and the force used to place Maureen's body into the dresser. *United States v. Goseyun*, 789 F.2d 1386, 1387 (9th Cir. 1986) (no error in admitting photographs of massive head injuries, photographs were admissible on the cause of death and the willful, deliberate and premeditated nature of the injuries). The State argues the photo of the wound to Maureen's sternum was not gruesome and bloody, and was relevant to depict the blows and the amount of force used. *Id.* (photographs which disclose the manner in which a victim was wounded are properly admitted on the issue of malice). The State argues the jawbone wound, People's Ex. 2, was not discernable in a two-dimensional photograph and was relevant to malice and identity. The tissue samples were also relevant to identify the victims. *Estelle v. McGuire*, 502 U.S. 62, 69-70 (1991) (evidence probative of an element may be introduced whether or not that element is specifically contested by the defense).

"We cannot disturb the state trial court's admission of the videotape recording on due process grounds in a habeas proceeding unless the admission of the photographs rendered the trial fundamentally

unfair." *Kealohapauole*, 800 F.2d at 1466, (*citing Batchelor v. Cupp*, 693 F.2d 859, 865 (9th Cir. 1982)). "The admission of photographs of a victim lies within the broad discretion of the trial court when a claim is made that they are unduly gruesome or inflammatory." *People v. Crittenden*, 9 Cal. 4th 83, 133 (1994) (prosecution not obligated to rely solely on testimony or accept an antiseptic stipulation); *People v. Wilson*, 3 Cal. 4th 926, 938 (1992) (rejecting argument that evidence was cumulative); *People v. Price*, 1 Cal. 4th 324, 441, (1991) (trial court has broad discretion to admit photos of murder victim). "The court's exercise of that discretion will not be disturbed on appeal unless the probative value of the photographs clearly is outweighed by their prejudicial effect." *Crittenden, id.*; *Wilson, id.*; *People v. Mickey*, 54 Cal. 3d 612, 655-656 (1991); *People v. Sanders*, 51 Cal. 3d 471, 514 (1990); *People v. Mason*, 52 Cal. 3d 909, 944 (1991).

The California Supreme Court decided the same claim. It found the evidence highly probative because it was "supportive of the prosecution's theory that the victims had been brutally murdered." *Garceau*, 6 Cal. 4th at 180-81. It also bore on issues of malice, premeditation, and Garceau's actions to conceal the bodies. *Id.* The photograph showed the positions of the bodies in the dresser, corroborating Whittington's testimony of the means of concealment. *Id.* at 181. The photograph of Maureen's sternum established that Garceau used different degrees of force during the fatal attack, which was relevant to the question of malice. *Id.* The tissue samples were not readily identifiable as human tissue, and supported the theory that the victims were killed in Shepard's apartment and then transported to Shandon. *Id.* The jawbone revealed Maureen was stabbed with sufficient force to penetrate completely through the bone, strongly suggesting Garceau acted with malice. *Id.* "[T]he trial court did not abuse its discretion in admitting the challenged physical evidence," the record supported finding that the photos' probative value to corroborate the prosecution's theory of the case outweighed prejudice, nor was the prosecutor required to accept the defense stipulation, which did not effectively explain the physical condition of the bodies. *Id.* at 182.

The presumption of correctness given the state court findings has not been rebutted. Admission of the challenged evidence did not render the trial fundamentally unfair. Claim M is denied on the merits.

Claim N - Insufficient Evidence: Uncorroborated Accomplice Testimony

On direct appeal, Garceau was granted $2,100 to investigate whether the prosecution withheld evidence that witnesses had been promised benefits in return for their testimony.[30] The investigation disclosed Wayne James, the only witness Garceau alleges the prosecution presented as not involved in the Shandon drug conspiracy, was arrested with Whittington in 1990 for a narcotics violation in Illinois.

Garceau claims this fact is significant because the majority of the testimony linking him with the murders came from members of the drug conspiracy, while Wayne James supplied the corroborating evidence required for the conviction. Garceau maintains the connection between James, the only allegedly independent witness, and Whittington, the leader of the conspiracy, indicates all the evidence against him was from co-conspirators.

The State responds that Whittington, Shepard and Susan Rambo were accessories to the murders by assisting in concealing the bodies and cleaning the crime scene, but the evidence was insufficient to find them accomplices in the murders. The trial court ruled that whether the killings were committed in furtherance of a drug conspiracy was a factual determination for the jury. The State argues that even if all witnesses whose testimony inculpated Garceau were found to be accomplices, the evidence was sufficient to corroborate their testimony.

The California Supreme Court recognized that for a witness to be "an accomplice as a matter of law, the record must establish, . . . either the witness aided and abetted defendant in committing the killings" or conspired with a person who harbored intent to commit the offense which was the object of the conspiracy. *Garceau*, 6 Cal. 4th at 183 (emphasis added). The Supreme Court concluded the trial evidence did not establish either theory. *Id.* At most, Shepard, Whittington and Susan were accessories. "No evidence connected these witnesses (or anyone else) to the actual killings. . . . The aiding and abetting theory therefore

---

30. The total amount requested was $2,350.

fails for lack of evidence that any of the prosecution's witnesses assisted defendant in committing the killings." *Id.* Even though the state court found the key witnesses were part of a drug conspiracy, the killing of Maureen and Telesforo was not the object of that conspiracy, nor committed in furtherance of the drug conspiracy. *Id.* at 183-84.

James's association with Whittington occurred after the murders and the trial. No evidence of prior business association between James and Whittington was offered. Even if such evidence existed, the jury had substantial evidence to determine James was not an accomplice or co-conspirator. The credibility of the defense theory was for the jury to determine. It did so. Substantial evidence supports the jury's determination that the murders of Maureen and Telesforo were not in furtherance of the drug conspiracy. No corroborating evidence is necessary as the key prosecution witnesses were not accomplices to the murders. Claim N is denied on the merits.

Claims O, P, Q, R - Instructional Error

Generally, errors of state law are not cognizable on federal habeas. If a challenged instruction, viewed in the context of the overall charge, shows a denial of due process which renders the trial unfair, habeas relief may lie. *See Cupp v. Naughten*, 414 U.S. 141, 147 (1973); *Henderson v. Kibbe*, 431 U.S. 145, 154 (1976). A claim that instructional error violates a defendant's constitutional rights depends on the evidence and the overall instructions. *Villafuerte v. Stewart*, 111 F.3d 616, 624 (9th Cir. 1997); *Duckett v. Godinez*, 67 F.3d 734, 745 (9th Cir. 1995).

Claim O is that the failure to limit the use of other crimes evidence, specifically of Greg's murder and Garceau's use, manufacture and sale of drugs, allowed the jury to consider the evidence for any purpose, especially as evidence of Garceau's bad character and propensity to commit the murders. Garceau argues the giving of the prosecution's Special Instruction 3, instead of the modified CALJIC 2.50 requested by the defense, told the jury they could consider the other crimes evidence to show Garceau's bad character. He asserts the case was based on circumstantial evidence, and turned on the believability of purportedly unreliable prosecution witnesses. This instruction permitted

the jury to use other crimes evidence to find guilt and to enable the prosecutor to give a prejudicial closing argument about the Rambo murder.

The California Supreme Court addressed Garceau's due process claim to the challenged other crimes instruction and found the trial court erred by giving an instruction which permitted other crimes evidence to be considered for any purpose, including Garceau's character and propensity to commit murder. *Garceau*, 6 Cal. 4th at 186. In light of the overwhelming evidence of Garceau's guilt, the challenged instruction was harmless error. *Id.* at 187. Garceau does not overcome the presumption of correctness of state court findings. Garceau now complains more evidence of his drug use and its effects should have been admitted. His relationship with Susan following the murder of Greg was relevant to her credibility. The erroneous instruction did not render the trial fundamentally unfair. Claim O is denied on the merits.

Claim P is that the trial court refused defense Special Instruction H (testimony may only be considered for a possible motive), and the use of Prosecution's Special Instruction 1 (testimony may not be used to determine bad character or disposition to commit crimes, but may be used for motive, identity, state of mind, corroboration of other evidence and credibility), failed to adequately define the limited admissibility of testimony by Nash, Officer Sylvester, Judge Coen and Ms. Christie.

The California Supreme Court, on direct review, addressed this due process claim and held Nash's and others' testimony was properly admitted to show motive, the killer's identity and state of mind, and corroborated other testimony. *Garceau*, 6 Cal. 4th at 195. Special Instruction 1 allowed the jury to consider the testimony for any of these valid limited purposes. *Id.* Garceau provides no evidence to overcome the presumption of correctness of state court findings. This instruction did not render the trial fundamentally unfair. Claim P is denied on the merits.

Claim Q is that the trial court erred by failing to give defense Special Instructions D (guiding instruction regarding reasonable doubt) and F (cautionary and guiding instructions regarding confessions). Garceau contends the refused instructions were "pinpoint instructions" to inform the jury of the significance of evidence in light of the defense theory and were appropriate to show the prosecutor bears the burden of

ultimate persuasion. The trial court refused the instructions on the ground they were argumentative. Instruction D was also refused as its effect would have had the court decide disputed jury issues and in effect directed the jury to make certain findings. Instruction F was also refused as duplicative. Garceau argues the refused instructions rendered his trial fundamentally unfair and prejudiced the penalty determination. The California Supreme Court held the special instructions were correctly refused as they were argumentative and duplicative of other instructions given. *Garceau*, 6 Cal. 4th at 192-94.

Garceau provides nothing to overcome the presumption of correctness given to the state court findings. A defendant is not entitled to argumentative or cumulative instructions on a subject already covered by instructions. Claim Q is denied on the merits.

Claim R is that the trial court's refusal of three instructions[31] requested by the defense and adoption of 20 instructions on the issue of accomplices and conspiracy, confused the jury and failed to adequately inform the jury of the appropriate standard to judge the testimony of the drug conspirators. The California Supreme held the standard instructions regarding accomplice liability were not confusing, the misreading of CALJIC Nos. 3.19 and 6.10.5 constituted harmless error, and it was not error to refuse the instructions requested by the defense. *Garceau*, 6 Cal. 4th at 188-91.

Garceau has not overcome the presumption of correctness given to the state court findings. The conspiracy and accomplice instructions correctly stated the law, and the defendant's "Matter of Law" instructions were not justified by the evidence. The instruction to examine the testimony of an informer with greater care than an ordinary witness was not required under state law, and was duplicative of credibility instructions that were given. Claim R is denied on the merits.

Claim S - Trial Court's Refusal of Voluntary Intoxication

---

31. The defense requested CALJIC No. 3.16 (Accomplice as a Matter of Law), a Conspiracy as a Matter of Law instruction, and Special Instruction A (Testimony of an Informer).

Instruction

Garceau claims the evidence justified a voluntary intoxication instruction. He points to Whittington's testimony that Garceau was "paranoid" prior to the murders; Susan's description that the morning after the murders he was continuously freebasing cocaine, was nervous, jumpy, "hyper," and not coherent; and Codd's statement that he "became a different person," "couldn't think straight and was very paranoid" when he was freebasing. Garceau admits no witness testified to his use of cocaine immediately before the murders and there is no direct evidence of at what time on the day of the murders he began freebasing cocaine. He contends his known habit (that if he had cocaine he smoked it until it was gone) and the testimony that he was freebasing shortly after the killings, leads to an inference that he was freebasing prior to the murders.

The State asserts the trial court did not err in refusing the instruction, as the evidence at trial was insufficient to support the instruction. *See Garceau*, 6 Cal. 4th at 196-198. In *People v. Williams*, 45 Cal. 3d 1268 (1988), the California Supreme Court affirmed refusal of a voluntary intoxication instruction, where evidence supportive of the defense was minimal. *Id.* at 1311. The evidence in *Williams* was provided by an accomplice, present at the time of the murder, who stated Williams "was 'acting like he was on LSD' and was 'acting crazy,' i.e., 'making facial expressions, being kind of jumpy . . . [changing] the tone of his voice.'" *Id.*

Here, the evidence found insufficient for a voluntary intoxication jury instruction, RT-XIII:3609-12, was less direct and more remote from the murders than the evidence in *Williams*. Whittington, who saw Garceau just before the murders, made no comment about Garceau's behavior or mental state at that time. Garceau's interpretation of Whittington's testimony, that Whittington described Garceau as acting "paranoid," is misleading. It was Garceau who asked whether his concern about Maureen "snitching" was paranoid. Whittington merely agreed. Conversely, this exchange indicates Garceau was able to analyze his own behavior and thought process and to seek third-party verification. This undercuts the contention Garceau was too intoxicated to reflect upon his actions.

Whittington testified that the following morning, after the murders, Garceau was "really excited," RT-XI:2782, "he had an excited look on his face, upset, like he didn't know what to do." *Id.*:2864.[32] Such behavior is explainable as a reaction to the killings, and does not necessarily indicate intoxication. The testimony from Susan is even more remote from the time of the killings. Whittington regularly supplied Garceau with cocaine, but made no mention of doing so that morning. Even if Whittington did not supply Garceau with cocaine after the murders and Garceau possessed the cocaine Susan saw him freebase later that morning before the murders, the trial evidence was insufficient to support the conclusion that Garceau was intoxicated at the time of the murders. The court did not err in refusing the voluntary intoxication instruction.

Garceau suggests absence of a voluntary intoxication instruction prevented his presentation of this theory of defense. Mr. Simrin asserts he "was barred by the trial court from even explaining to the jury, in argument at the guilt phase, the effect that Mr. Garceau's cocaine use had upon him." Ex. 49:4. Mr. Simrin's recollection is mistaken. He was not precluded from arguing the cumulative effect cocaine use had on Garceau's conduct. RT-XIII:3652-54. Mr. Simrin mentioned more than once in closing argument during the guilt phase the effect that Garceau's drug use had on his behavior and that it prevented a premeditated and deliberated state of mind. RT-XIV:3734-35, 3756, 3774. The trial court's refusal of the voluntary intoxication instruction did not impair Garceau's right to present his defense. Claim S is denied on the merits.

Claim T - Cumulative Error at Guilt Phase

Garceau argues all the errors impermissibly allowed the jury to consider evidence against him without proper instruction, undermining his credibility, enhancing that of accomplices, to impermissibly lighten

---

32. Although Shepard also saw Garceau immediately after the murders, her testimony made no mention of his behavior or mental state.

the prosecutor's burden of proof, constituting cumulative prejudicial error. None of Garceau's claims independently establish a violation of federal rights. Where no claim states a violation of constitutional law, there is no reason to grant habeas relief based on cumulative error. *Rupe v. Wood*, 93 F.3d 1434, 1445 (9th Cir. 1996). *See also Hoxsie v. Kerby*, 108 F.3d 1239, 1245 (10th Cir. 1997) ("Cumulative-error analysis applies where there are two or more actual errors"). Even assuming, *arguendo*, that constitutional error occurred at Garceau's trial, prejudice has not been established. The record provides substantial support for the jury's conclusion that, consistent with his numerous confessions, Garceau ruthlessly murdered Maureen and Telesforo. Claim T is denied on the merits.

Claims U, V, W - Erroneous Admission During Penalty Phase of Other Crimes Evidence

Generally, evidentiary error does not provide habeas relief unless it violates due process by rendering the trial fundamentally unfair. *Johnson v. Sublett*, 63 F.3d 926, 930 (9th Cir. 1995) (*citing Estelle v. McGuire*, 502 U.S. at 67-69); *Kealohapauole*, 800 F.2d at 1465 (habeas only available for a deprivation of federal rights). If Garceau "had challenged only the state court's evidentiary ruling, he would have alleged no deprivation of federal rights. However, [Garceau] claims the [other crimes evidentiary rulings] deprived him of due process under the fourteenth amendment, . . . a cognizable claim under [28 U.S.C.] § 2254," *Kealohapauole*, 800 F.2d at 1465, undermining the reliability of the penalty verdict.

Garceau objects to the evidence of a 1981 possession of a machine gun charge, multiple felon in possession counts, and a 1982 arrest for kidnapping and possession of an explosive device. The trial court denied the motions to exclude, after a hearing on the kidnapping charge before that evidence was admitted. The State contends this criminal activity was part of Garceau's criminal history and properly considered to show character and background relevant to the appropriate penalty. The California Supreme Court addressed the identical claim and held the unadjudicated crimes evidence did not violate due process, make the penalty unreliable, nor violate double jeopardy principles.

Garceau, 6 Cal. 4th at 199-200. Garceau provides nothing new to overcome the presumption of correctness given to the state court findings. The evidence of unadjudicated criminal activity gave the jury insight into Garceau's past conduct and character. It did not render the penalty trial fundamentally unfair. Claim U is denied on the merits.

Claim V separately attacks evidence of the Sems's kidnapping, asserting guilt was not shown beyond a reasonable doubt. The California Supreme Court held Ms. Sems's out-of-court identification of Garceau as the driver of the truck during the alleged kidnapping was sufficient for admitting evidence of the incident. *Garceau*, 6 Cal. 4th at 201. The precondition to admissibility is not proof of Garceau's involvement beyond a reasonable doubt; that is a jury question. *Id.*

Garceau makes no further showing to overcome the presumption of correctness given to the state court findings. Substantial evidence supported Garceau's role in the alleged kidnapping. Its admission did not render the penalty trial fundamentally unfair. Claim V is denied on the merits.

Claim W criticizes the judge's refusal to hold a hearing on the 1981 and 1982 unadjudicated weapons charges. Garceau contends limiting instructions could not cure this error.

The California Supreme Court found Garceau did not request a hearing, so the issue was not preserved for appeal. *Garceau*, 6 Cal. 4th at 203. Even if the issue had been preserved, substantial evidence established each element of the alleged offense; i.e., Garceau was a felon, police searches uncovered illegal weapons, and additional evidence showed Garceau possessed weapons. *Id.* at 203-04. Garceau offers nothing new to overcome the presumption of correctness given to the state court findings. The weapons evidence was probative to Garceau's criminal lifestyle, dangerousness, the associations he maintained, and did not render the proceedings unfair. Claim W is denied on the merits.

Claim X - Prosecutor's Comment on Future Dangerousness

Garceau argues no evidence supported the prosecutor's argument as to his future dangerousness, or that Garceau posed a threat while in custody, and asserts the argument against him was inaccurate, denying

him due process. Garceau's view would limit a capital jury's consideration of future dangerousness to the probability of harmful conduct in prison, since a capital crime defendant will not be eligible for parole or release from prison. From this premise, Garceau concludes evidence of prior felonies and violent acts are not predictive such conduct will continue in prison. Garceau argues that the absence of evidence he had committed violent acts in custody proves he does not pose a threat to the safety of other inmates and jailers. He also claims the prosecutor gave no notice that future dangerousness would be used in aggravation.[33] Garceau suggests the prosecutor's argument did not ask the jury to draw legitimate inferences from the evidence, but rather urged death because Garceau failed to prove the absence of his potential for future dangerousness, violating his due process right to notice and Sixth Amendment right to counsel.

The State rejoins this claim is waived by Garceau's failure to object at trial, as the alleged misconduct was curable by admonition. The prosecutor commented in closing argument on the weight of mitigation evidence and referred to future dangerousness in response to the defense argument that Garceau was a model prisoner. The State contends no § 190.3 notice was required because the prosecution presented no evidence of future dangerousness. Even if § 190.3 includes a notice requirement for prosecution argument, an exception to the notice requirement exists for rebuttal evidence.

The prosecutor was entitled to comment on future dangerousness, a proper subject for a capital jury to consider in fixing sentence. *California v. Ramos*, 463 U.S. at 1001-04. Here, the prosecution offered no evidence of future dangerousness. The argument was made only in rebuttal to Garceau's assertion that he was a model prisoner. Claim X is denied on the merits.

---

33. § 190.3 requires that notice be given prior to trial of *evidence* the prosecution intends to present in aggravation during the penalty phase. However, evidence introduced in rebuttal to evidence submitted by the defendant in mitigation may be introduced without notice.

Claim Y - Prosecutorial Misconduct During Penalty Phase

Garceau contends inflammatory and improper remarks by the prosecutor at the penalty phase, "rendered his sentence unfair." Specifically, (1) the prosecutor's appeal to emotions in mentioning the frailty of Telesforo, urging death based on the status of the victim; (2) the evidence of an "arsenal" of weapons which the prosecutor admitted was inadmissable under § 190.3 and belatedly tried to justify as "corroborative" of Sems's testimony; (3) converting neutral and mitigation evidence into aggravation evidence by: (a) arguing future dangerousness in response to Garceau's record of good adjustment in prison; (b) arguing Garceau's brother "turned out all right," in response to evidence about Garceau's childhood; and (c) arguing other veterans are not "kid killers," in response to evidence about his Vietnam service; and (4) suggesting sympathy was a relevant mitigating factor only to the extent it mitigated the severity of the crime.

The State rejoins Garceau's failure to object at trial waived the alleged misconduct which was curable by admonition. The comment about Telesforo was proper as it was fair comment about the circumstances of the crime and the killing of one of the victims. Nor did the prosecutor argue that mitigating evidence was aggravating, but instead told the jury they could consider all evidence presented during the penalty phase and properly argued death was the appropriate penalty.

Although the prosecutor strenuously argued the evidence justified a death verdict, he repeatedly directed the jury to consider all the evidence, and informed them it was their job to assign weights and values to the sentencing factors. The prosecutor's comments pertaining to the "arsenal" of weapons were proper, based on evidence properly adduced during the penalty phase. There was no misconduct in the prosecutor's closing argument. Claim Y is denied on the merits.

Claim Z - Denial of Effective Appellate Review by the California Supreme Court

Garceau alleges he was denied meaningful appellate review on direct appeal because California's affirmance rate for capital cases since 1992 is 98.68 per cent. A claim challenging the *adequacy* of state

appellate review is not cognizable on federal habeas. This conclusion follows from the long-established principle that the United States Constitution does not require appellate review. *Evitts v. Lucey*, 469 U.S. 387, 393 (1985) (*citing McKane v. Durston*, 153 U.S. 684 (1894)). The federal constitution only requires that an appellate forum be accessible and available to all, regardless of economic status, once a state establishes a right to appeal. *Lucey*, 469 U.S. at 393-94.

Appellate review of California's capital cases is authorized of right by Cal. Penal Code §§ 190.4(e) and 1239(b). At the time of Garceau's trial, § 1239(b) provided, "When upon any plea a judgment of death is rendered, an appeal is automatically taken by the defendant without any action by him or his counsel." Even where defendant's counsel takes *no* action, California's high court has a duty to examine the complete trial record to "ascertain[] whether defendant was given a fair trial." *People v. Perry*, 14 Cal. 2d 387, 392 (1939), *quoted in People v. Stanworth*, 71 Cal. 2d 820, 833 (1969).

Section 190.4 provides an automatic application for modification of a verdict imposing the death penalty, by which the trial judge reviews the evidence and reweighs the § 190.3 aggravating and mitigating circumstances before imposing sentence based on the jury's verdict. Denial of modification of a verdict of death is reviewed on the automatic appeal pursuant to § 1293(b). Such review includes the "evidence relied on by the [trial] judge." *Pulley v. Harris*, 465 U.S. 37, 53 (1984) (*quoting People v. Frierson*, 25 Cal. 3d 142, 179 (1979)) ("the statutory requirements that the jury specify the special circumstances which permit imposition of the death penalty, and that the trial judge specify the reasons for denying the modification of the death penalty, serve to assure thoughtful and effective appellate review, focusing upon the circumstances present in each particular case.").

Aside from the state statutory duty to examine the complete trial record for fairness and the federal constitutional requirement that an appeal be available to indigent appellants, there are no obligations placed on the California Supreme Court that could cause a violation of an appellant's federal constitutional rights. Sections 190.4(e) and 1239(b), and the cases construing them, provide the mechanism for meaningful appellate review.

There is no federal constitutional right to adequate appellate

review. Under well-established principles of law and comity, a federal court has no jurisdiction over state courts to assess the adequacy or competence of their review since appellate review is not constitutionally required. *Evitts v. Lucey*, 469 U.S. 387, 393 (1985). Claim Z is dismissed with prejudice as it raises no cognizable federal claim. It is denied on the merits.

Claim AA - Ineffective Assistance of Appellate Counsel

Garceau alleges he was denied effective assistance of appellate counsel. There is no federal basis for this claim. No claims in Garceau's federal petition were subject to state procedural default for failure to raise them on direct appeal, nor does he indicate how appellate counsel was ineffective. *See In re Dixon*, 41 Cal. 2d 756 (1953). Claim AA is denied on the merits.

Claim BB - Unconstitutional Death Penalty Statute

Garceau's challenges to California's statute are summarized as follows:

(a) The numerous special circumstances of § 190.2 embrace all murders, thus failing to narrow the class of persons for whom the death penalty is reasonably justified;

(b) The § 190.3 factors are not defined as aggravating or mitigating, thus violating the right to a reliable and fair sentence determination;

(c) The jury is not required to find that death is the appropriate sentence beyond a reasonable doubt;

(d) The jury is not required to find the existence of an aggravating factor unanimously and beyond a reasonable doubt;

(e) The jury is not required to make written findings as to the aggravating factors;

(f) Prosecuting agencies are not directed by selection procedures

in the exercise of their charging discretion;

(g) The imposition of the death penalty was disproportionate in this case; and

(h) The prosecutor's use of peremptory strikes to exclude pro-life jurors from the jury denied a fair trial and reliable sentence determination.

California v. Ramos, 463 U.S. 992 (1983), states "[o]nce the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty" the jury's consideration of a myriad of factors and exercise of "unbridled discretion" in determining whether death is the appropriate punishment is not arbitrary and capricious. *Id.* at 1008-09. At the selection stage, an *individualized* determination includes consideration of the character and record of the defendant, the circumstances of the crime, and an assessment of the defendant's culpability. *Tuilaepa*, 512 U.S. at 972-73. However, the jury "need not be instructed how to weigh any particular fact in the capital sentencing decision." *Id.* at 979.

Arguments (b) and (g) are foreclosed by *Tuilaepa*, 512 U.S. at 979 (jury need not be instructed how to weigh any particular factor) and *Pulley v. Harris*, 465 U.S. 37, 50 (1984) (proportionality review is not constitutionally required).

The California Supreme Court has considered and rejected the same challenges presented by arguments (a), (c), (d), (e), (f) and (h). *People v. Arias*, 13 Cal. 4th 92 (1996), rejected the challenge in (a), "California's scheme for death eligibility satisfies the constitutional requirement that it 'not apply to every defendant convicted of a murder, but only to a subclass of defendants convicted of murder.' *Tuilaepa v. California*, 512 U.S. 967, (1994). . . . [T]he special circumstances set forth in the statute are not over inclusive by their number or terms, nor have the statutory categories been construed in an unduly expansive manner." *Arias*, 13 Cal. 4th at 187 (*citing People v. Crittenden*, 9 Cal. 4th 83, 155 (1995) and *People v. Bacigalupo*, 6 Cal. 4th 457, 467 (1993)).

Arguments (c), (d) and (e) were disposed of by *People v. Cox*, 53 Cal. 3d 618, 692 (1991), holding unanimity, written findings, and proof beyond a reasonable doubt are not required to confirm aggravating factors exist, that aggravating factors outweigh mitigating factors, or that death is appropriate. *Id.* at 692; *see also, Bonin v. Vasquez*, 807 F. Supp. 589, 622-23 (C.D.Cal. 1992).

Argument (f) has been considered and rejected: "[P]rosecu-torial discretion to select those eligible cases in which the death penalty will actually be sought does not in and of itself evidence an arbitrary or capricious capital punishment system or offend principals of equal protection, due process, or cruel and/or unusual punishment." *People v. Keenan*, 46 Cal. 3d 478, 505 (1988); *People v. Holt*, 15 Cal. 4th 619, 702-03 (1997) (refusing to reconsider identical challenge previously rejected to California's death penalty statute). As in *Keenan*, Garceau makes no allegation of purposeful, invidious discrimination, but only asserts capital charging by the prosecutor is without standards. The California Supreme Court found the claim "patently insufficient to raise the issue of individual or systematic discrimination on invidious grounds." *Keenan*, 46 Cal. 3d at 507.

Argument (h) has been rejected: "Assuming for the sake of argument that the prosecutor exercised peremptory challenges [to remove all prospective jurors who expressed reservations regarding imposition of the death penalty], we have held on numerous occasions that the prosecution may do so." *People v. Champion*, 9 Cal. 4th 879, 907 (1995).

The grounds alleged in (a), (c), (d), (e), (f) and (h) do not violate the United States Constitution. Sentence selection in a capital case permits the jury broad discretion. *Tuilaepa*, 512 U.S. at 979. Claim BB is denied on the merits.

V. Procedurally Defaulted Claims[34]

---

34. Garceau's petition is not subject to procedural bar for timeliness or under the *Dixon* rule, as his initial procedural default in state court was pre-*Clark*. *Calderon v. U.S. Dist. Ct. (Hayes)*, 103 F.3d 72, 75 (9th Cir. 1996).

On direct appeal, six of Garceau's state claims were procedurally defaulted for failure to preserve for appeal or to comply with the contemporaneous objection rule. *People v. Garceau*, 6 Cal. 4th 140 (1993). Although not raised by the State, the claims in Garceau's federal petition defaulted by the state court, are: Claims H, L, X, and Y.[35] *See Boyd v. Thompson*, 147 F.3d 1124, 1127 (9th Cir. 1998) (district court may raise issue of procedural default sua sponte).

The independent and adequate state ground doctrine, announced in *Wainwright v. Sykes*, 433 U.S. 72, 86-87 (1977), "applies to bar consideration on federal habeas of federal claims that have been defaulted under state law." *Lambrix v. Singletary*, 520 U.S. 518, 523 (1997) (*citing Coleman v. Thompson*, 501 U.S. 722, 729-730, 750 (1991)). "[S]o long as the state court explicitly invokes a state procedural bar rule as a separate basis for decision," *Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989), and the state rule is well established and regularly applied, the claim cannot be considered on federal habeas unless a petitioner can show cause and prejudice, or a miscarriage of justice, to excuse the default. *Coleman*, 501 U.S. at 750.

It is unnecessary to resolve whether Garceau's defaulted claims are barred from federal review, as they have no merit. Even assuming California's procedural default rules were independent of federal law and were regularly and consistently applied at the time Garceau's appeal was pending in the state court, and assuming Garceau could show cause for his default, Garceau cannot show prejudice in light of the record. Garceau is not entitled to habeas relief on any of the defaulted claims.

VI. Certificate of Probable Cause

Appeal from an order denying habeas relief lies only if leave to appeal is obtained. The applicability of the AEDPA is determined by the date of the habeas proceedings, not the date of the notice of appeal. *Fuller v. Roe*, ___ F.3d ___, 1999 WL 462632, *2 (9th Cir. May 10, 1999). Garceau is not subject to certificate of appealability requirements

---

35. Three of Garceau's state claims are combined into Claim Y in his federal petition.

of the AEDPA. Before enactment of the AEDPA, leave to appeal was granted by the issuance of a certificate of probable cause by the judge who denied the petition, or by a circuit judge. Former 28 U.S.C. § 2253 (1996). A certificate of probable cause issues only upon the petitioner's "substantial showing of the denial of a federal right." *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983).

Garceau does not meet the pre-AEDPA standard. There is no showing of the denial of a federal right, required by *Barefoot*, for any claim advanced. No certificate of probable cause shall issue.

VII. Order

For the reasons stated above, IT IS ORDERED:

1. Garceau's petition for writ of habeas corpus is DENIED on the merits on every ground advanced. All declarations and evidentiary submissions have been treated as offers of proof and fully considered.

2. No certificate of probable cause shall issue.

3. Judgment shall be entered for RESPONDENT, the State, and against PETITIONER, Robert Frederick Garceau.

SO ORDERED.

DATED: _____

_____

OLIVER W. WANGER
United States District Judge

Robert Frederick Garceau, CIV. F-95-5412-OWW-P

TABLE OF CONTENTS

I. Introduction 1
II. Procedural History 1
III. Applicability of the AEDPA 3
IV. Facts 3
VI. Analysis 23
Claim A -
Ineffective Assistance of Counsel at Guilt and Penalty Phases 23
1. Failure to Investigate Eddie Nash. 25
2. Failure to Investigate or Present Impeachment Evidence 27
3. Failure to Investigate or Present Defense of Diminished Actuality. .. 28
4. Failure to Investigate or Present Evidence of Vietnam Experience and Post-Traumatic Stress Disorder 32
5. Failure to Investigate or Present Evidence of Drug Abuse. 34
6. Failure to Investigate or Present Readily Available Medical and Psychiatric Evidence in Mitigation 35
7. Failure to Adequately Investigate and Defend Against Charges in Aggravation 37
8. Failure to Object to Prosecutorial Misconduct During Penalty Phase Closing Argument. 39
Claim B - No Requisite Mens Rea for Murder 43
Claim C - Denial of Psychiatric Assistance 48
Claim D -
False and Misleading Testimony of Susan Rambo and Wayne James ... 49
Claims E, F, and G -
Excessive Security and Presence of Television Crews 54
Claim E 54
Claim F 57
Claim G 59
Claim H - Discriminatory Use of Peremptory Challenges 60
Claim I - Improper Cause Exclusion of Anti-Death Prospective Juror ... 68
Claim J - Cumulative Error in Jury Selection 70
Claim K - Erroneous Denial of Section 352 Motion 70
Claim L - Erroneous Admission of Garceau's Statement 73
Claim M - Erroneous Admission of Highly Inflammatory Evidence 74
Claim N -
Insufficient Evidence: Uncorroborated Accomplice Testimony 78
Claims O, P, Q, R - Instructional Error 80
Claim O 80

Claim P 81
Claim Q 82
Claim R 83
Claim S - Trial Court's Refusal of Voluntary Intoxication Instruction ... 84
Claim T - Cumulative Error at Guilt Phase 86
Claims U, V, W - Erroneous Admission During Penalty Phase of Other Crimes Evidence 87
Claim V separately 88
Claim W 89
Claim X - Prosecutor's Comment on Future Dangerousness 89
Claim Y - Prosecutorial Misconduct During Penalty Phase 91
Claim Z - Denial of Effective Appellate Review by the California Supreme Court 92
Claim AA - Ineffective Assistance of Appellate Counsel 94
Claim BB - Unconstitutional Death Penalty Statute 95
V. Procedurally Defaulted Claims 98
VI. Certificate of Probable Cause 99
VII. Order 100

SUPREME COURT
FILED
NOVEMBER 18, 1993
Robert Wandruff Clerk

COPY

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

THE PEOPLE,	)	
	)	S004776
Plaintiff and Respondent,	)	[CR 26410]
	)	
v.	)	(Super. Ct.
	)	No. 29601)
ROBERT FREDERICK GARCEAU,	)	
	)	
Defendant and Appellant.	)	
	)	

Following the guilt phase of a jury trial, a jury found defendant Robert Frederick Garceau guilty of two counts of first degree murder (Pen. Code, §§ 187, 189),[1/] and found true the allegation of

---

1. All further statutory references are to the Penal Code unless otherwise indicated.

SEE CONCURRING OPINIONS

personal use of a knife in the commission of each offense (§ 12022, subd. (b)) and a multiple-murder special circumstance. (§ 190.2, subd. (a)(3).) At the penalty phase, the jury fixed the penalty at death, and thereafter the court imposed a sentence of death.

This case reaches us on automatic appeal. (Cal. Const., art. VI, § 11; § 1239, sudb. (b).) We affirm the judgment in its entirety.

FACTS

The evidence at trial established that on September 6 or 7, 1984, in a Bakersfield apartment, defendant fatally stabbed his girlfriend, Maureen Bautista, in the presence of her 14-year-old son, Telesforo. Immediately thereafter, defendant fatally stabbed Telesforo. Several hours after defendant committed the murders and departed from the crime scene, two of his acquaintances, Greg Rambo and Larry Tom Whittington, returned to the apartment and concealed the victims' bodies inside a bedroom dresser. Defendant and Rambo transported the dresser containing the bodies out of Kern County to the town of Shandon, located in San Luis Obispo County, entombing the dresser beneath a layer of fresh concrete in the yard behind Rambo's residence.[2/]

---

2. Five months after these events, on February 19, 1985, defendant fatally shot Greg Rambo. The evidence suggested that Rambo had been killed in a shed in the town of Parkfield, located in the southwest corner of Monterey County. Prior to the trial in the present case, defendant was tried separately in Monterey County for the Rambo killing, convicted of murder, and sentenced to serve a state prison term of 33 years to life. In June 1987,while the present case was in trial, the Court of Appeal affirmed defendant's conviction for the Rambo murder (but reversed defendant's additional convictions for conspiracy and methamphetamine manufacturing) in an unpublished opinion. (People v. Garceau (June 3, 1987) H001539.) His conviction for the murder of Rambo is not before use on this

Although no physical evidence was discovered linking defendant to the Bautista murders, several of his acquaintances testified that he confessed committing the crimes to them prior to his arrest in March of 1985. The defense focused upon impugning the credibility of these witnesses. Defendant did not present an alibi defense, nor did he testify.

---

appeal.

Prior to the defendant's trial for the Bautista murders, defense counsel informed the prosecution and the trial court that he intended to use the Rambo killing to reinforce the defense theory that one or more of defendant's acquaintances had a motive to murder the Bautistas and Greg Rambo. Thus, (Footnote continued on next page.) (Footnote continued from previous page.) the defense had no objection to the prosecutor introducing facts of the Rambo murder in the prosecution's case-in-chief. In his opening statement, defense counsel informed the jury that Rambo had been "murdered." During the trial, the jury heard testimony suggesting that defendant has murdered Rambo, but never was apprised that defendant has been convicted of that offense.

I. GUILT PHASE EVIDENCE

A. The prosecution's case

1. Overview

The prosecution's case rested largely on evidence that defendant had, on numerous occasions, confessed his participation in the crimes to acquaintances with whom he had been involved in the manufacture of methamphetamine. According to the prosecution, defendant killed Maureen Bautista because he feared she would "snitch him off" regarding his involvement in methamphetamine manufacturing, and killed her son, Telesforo, because Telesforo had witnessed defendant's lethal attack on his mother. In support of its case, the prosecution presented numerous witnesses who testified to defendant's intense hatred of "snitches" (persons who report illegal activities to third persons) and to defendant's frequent comments, both before and after the Bautista murders, to the effect that "snitches die."

2. Defendant's methamphetamine manufacturing activity, and his relationship to the victims

Greg Rambo's surviving spouse, Susan Rambo (who was granted immunity in exchange for her testimony), provided important testimony regarding the principal elements of the prosecution's case. She described defendant's methamphetamine manufacturing activity, which began during the summer of 1984 in a small trailer located behind the Shandon residence that she shared with her husband, Greg Rambo. The trailer was located unobtrusively amidst dog kennels and old, discarded automobiles. The rural, unassuming setting was well suited to the covert operation of a methamphetamine laboratory. Defendant had met the Rambos through a mutual acquaintance, Larry Tom Whittington.

The participants in the drug operation maintained well-defined roles. Susan Rambo served as a lookout. Defendant was the "cook," the person who mixed the chemicals to prepare the methamphetamine (a product that also was referred to by certain

witnesses as "speed" or "crank.") Larry Tom Whittington financed the trailer laboratory, provided necessary supplies, and sold the finished product. Greg Rambo cleaned up after the "cook" and also served as a lookout. According to Susan Rambo, Whittington paid her husband, in cash and with methamphetamine, for the use of the trailer.

According to numerous witnesses, defendant frequently "freebased" (i.e., smoked) cocaine. His profit in manufacturing methamphetamine consisted chiefly of a ready supply of cocaine from Larry Tom Whittington. According to Susan Rambo, Whittington "would supply the cocaine for [defendant], deduct what they owed him for the cook . . . and gave [defendant] money when he needed it."

Susan Rambo testified that defendant prepared his first batch of methamphetamine in the trailer laboratory in August 1984, and prepared four to six subsequent batches that year. Each batch required two to three days to prepare, during which time, according to her, defendant stayed awake, smoking his cocaine pipe. She said defendant freebased cocaine frequently, regardless whether he was manufacturing methamphetamine, and rarely was without cocaine for more than four or five days, when Larry Tom Whittington would replenish defendant's supply.

Larry Tom Whittington, testifying on cross-examination, substantially confirmed Susan Rambo's account of defendant's work habits and cocaine usage, stating that defendant stayed awake throughout each multi-day "cook," and that defendant consumed "a couple of ounces [of cocaine] a week, at least," and expense that, according to Whittington's estimate, cost defendant approximately $4,000 each week. Harlyn Codd testified (on cross-examination) that defendant "could put away an ounce of coke freebasing a day if he had it with him."[3/]

---

3. On cross-examination, Larry Tom Whittington acknowledged that his participation in the Shandon drug operation occurred while he was on bail, pending the appeal of a 1982 conviction for conspiracy to distribute cocaine.

At the time of defendant's trial in 1987, Whittington – his appeal having been unsuccessful – was serving a prison sentence stemming from this 1982 conviction.

Linda Rich, a friend of Maureen Bautista, testified that in the year preceding Bautista's murder, Bautista and defendant had a stormy relationship, punctuated with numerous arguments. She recalled one such quarrel, in April or May of 1984, in which she went to the door of the Bautistas' apartment (which was open, although the screen door was closed), heard the sound of dishes breaking, and observed that a telephone had been "pulled out." On cross-examination, Rich acknowledged that defendant had been kind to Telesforo and had purchased gifts for him, but also that defendant freebased cocaine in the boy's presence.

At the end of August or the beginning of September of 1984, the Bautistas joined defendant, Larry Tom Whittington, and Harlyn Codd on a fishing trip at Lake Isabella. Codd, overheard an argument between Maureen Bautista and defendant, in which defendant threatened to kill Maureen because she planned to "snitch" (on the drug operation participants) to Eddie Nash who, according to Susan Rambo, defendant considered to be his enemy.[4/] Susan Rambo testified that Codd had told her Nash was Telesforo's father; also, that Nash once had paid defendant to fulfill a contract but that defendant had failed to perform and, as a result, Nash was "looking for" defendant.

3. The "Nash" testimony

Over defendant's objection, the trial court permitted the prosecution to introduce the testimony of several witnesses to establish a connection between defendant and Eddie Nash, who was a convicted drug dealer. By this evidence, the prosecution sough to corroborate the testimony of other witnesses that defendant knew Nash, in order to demonstrate that defendant reasonably might have harbored a great fear of Nash because of Nash's violent reputation and prior criminal activities, and generally to support the evidence, noted above, that indicated defendant murdered Maureen Bautista because he feared she

---

4. Eddie Nash also was known as Edel Nasralla. Because he was referred to at trial as "Eddie Nash," we shall use that name in our opinion.

would inform Nash of defendant's whereabouts and his drug manufacturing activities.

4. The Bautista murders: defendant's conduct, confessions, and threats

On September 4, 1984, Maureen and Telesforo Bautista registered at a Bakersfield motel. The motel manager testified that he recalled seeing defendant that afternoon on the premises. On the evening of September 6, Telesforo prepaid in cash for that night's lodging. At a later point that evening, or in the early hours of the next morning, defendant and the Bautistas moved to an unoccupied Bakersfield apartment rented by Patricia Shepard.[5/]

Defendant telephoned Larry Tom Whittington near midnight on September 6, asking Whittington to meet him at Shepard's apartment immediately. When Whittington arrived, defendant said he and Maureen Bautista had been arguing loudly at the motel and had been concerned someone would call the police, so he and the Bautistas had moved to Shepard's apartment. Defendant told Whittington he was afraid Maureen was planning to "snitch him off" to Eddie Nash or Nash's attorney; defendant's fear stemmed from his belief that Nash was scheduled to be released from prison the following day. When Whittington asked defendant where the Bautistas were, he said they were sleeping in the bedroom. Whittington did not see them, nor did he hear any sounds emanating from the bedroom. He noticed the telephone appeared to have been ripped from the wall.

---

5. Patricia Shepard rarely used this low-rent apartment (which the defense characterized as her "welfare front"), and she and Larry Tom Whittington lived at his residence in Bakersfield. Shepard testified she retained her lease on the foregoing apartment to cover the contingency that she and Whittington (who was married to another woman) might separate. Whittington testifies that either he or Shepard had given defendant a key to the apartment, because defendant and Maureen had been fighting.

When Whittington awoke at his Bakersfield residence the next morning, September 7, to the sound of knocking, defendant entered and announced, "I did it. . . . I killed them." Defendant told Whittington that Maureen Bautista "was going to snitch me off [and] I know how to take care of snitches." When Whittington asked defendant to lower his voice so Shepard would not hear the conversation, defendant replied that Shepard should hear what happened, because the deaths had occurred in her apartment. She thereafter joined the conversation. Both Whittington and Shepard testified that defendant told them he had killed Maureen Bautista and "the kid" the previous evening.

Shepard further testified that defendant stated he had killed the Bautistas by slitting their throats with a knife. She testified that defendant demonstrated to her the manner of stabbing. When she (or Whittington) asked why defendant had killed Telesforo, defendant replied that Telesforo had seen him kill the boy's mother. Defendant told Shepard and Whittington that Telesforo had been afraid of "Jason," the fictional killer depicted in the motion picture "Friday the Thirteenth," but that the boy should have been afraid of defendant instead of "Jason."

A quarter of an hour later, defendant departed from Whittington's Bakersfield residence, informing him that defendant had to leave town, and driving off in Maureen Bautista's automobile, a beige Honda Accord.

Susan Rambo testified that defendant sped into her yard on a Friday morning early in September (September 7 was a Friday), driving Maureen Bautista's automobile. Defendant was "completely erratic, very hyper, babbling, not making sense," and excitedly stated: "They wouldn't believe me. I kept telling them. They wouldn't believe me. They should know what happens to snitches. Now she's dead."

Later that morning, after smoking his cocaine pipe, defendant appeared to calm down and make more sense. Defendant explained that Maureen Bautista had been yelling about "snitches," and that Maureen was going to "snitch" on everyone involved in the drug operation.

Susan Rambo testified defendant told her that when he stabbed Maureen Bautista, Telesforo began screaming hysterically. Defendant told Telesforo to shut up, and stabbed him when he did not. Defendant explained to Susan Rambo, "You have to take out all

witnesses."

Defendant also reminded Susan Rambo she too should be aware of what happens to "snitches": "If you don't want it to happen to you, you know you don't say anything. This is part of the game. This is part of the rules, part of the business. You're in it. You're involved." His threat made her afraid to contact the police, as did additional threats he directed toward her on numerous subsequent occasions regarding "the laws of snitches," his reminders that he killed "snitches," and his habit of arming himself with a gun and a knife.

On that same morning, September 7, Susan Rambo noticed that dark stains had discolored the pants defendant was wearing. Later that day, she observed defendant seated near her washing machine, naked, while the machine was operating.

Wayne James, another acquaintance of defendant, testified that defendant hated "snitches" and had told James that he had killed Maureen Bautista because she was going to "snitch him off," and that her son had walked in while defendant was killing her, so defendant had to "snuff him" too. Defendant told James he had killed the Bautistas by "stab[bing] them and cut[ting] them up with a knife."[6/]

5. Disposal of the Bautistas' bodies

Greg Rambo and Larry Tom Whittington returned to Shepard's apartment on September 7, placed the bodies of Maureen and Telesforo Bautista inside a hollow bedroom dresser, and, on the following day, defendant and Rambo transported the makeshift coffin to the Ramos' residence. Defendant thereafter told Susan Rambo that he and her husband were departing for Los Angeles for the purpose of

---

6. Defense counsel sought to impeach James on cross-examination by eliciting testimony from him that detailed his history of drug usage and sales, his failure accurately to recall Telesforo's name (he testified the boy's name was "Brian"), and his failure to inform the police upon learning of Greg Rambo's murder.

removing defendant's belongings from Maureen Bautista's apartment, and that if anyone asked about him or Maureen, she should reply by stating that she had not seen them in weeks.

Whittington testified that he and Patricia Shepard returned to Shepard's apartment to scrub off the bloodstains. He testified that he was able to remove the bloodstains, except for those on the carpet, which required repeated efforts at cleaning. Shepard testified, on cross-examination, that she had purchased the carpet cleaner and other materials that were used to clean her apartment following the killings.

After defendant and Greg Rambo departed for Los Angeles, Rambo called his wife and requested that she ask his cousin, Doug Frederick, to obtain a backhoe and dig an eight foot by ten foot hole in the Rambos' backyard. Rambo instructed his wife to tell Frederick that the hole was needed for the construction of a new drainage system for the Rambos' dog kennels. Susan Rambo did so.

Doug Frederick testified that he dug the hole on September 6, 7, or 10, 1984; Susan Rambo testified that she awoke on a Monday morning to the sound of a backhoe operating on the property, a circumstance suggesting that Frederick had dug the hole on Monday, September 10. She testified that the hole appeared to be "a couple hundred feet behind the house in the back corner of the lot."

Following defendant's return to Shandon, Susan Rambo noticed the presence of several bags and boxes in her garage, including a computer that defendant had given Telesforo Bautista, a television, a stereo, and some guns. At defendant's request, she purchased cement, bags for the bodies, and a needle to sew up the bags. Defendant told her he intended to place one foot of cement over the Bautistas' bodies. Susan Rambo testified that during the next few days, she observed defendant shoveling dirt into the hole for periods of up to one hour at a time.[7/]

---

7. Susan Dalton, a friend of Maureen Bautista's who last had spoken with her on September 2, 1984, reported her missing near the end of that month. Dalton's report was, in part, prompted by her visit to the Bautistas' residence, which she testified had been ransacked. Photographs were scattered

6. Defendant's conduct following his entombment of the Bautistas' bodies

Defendant resided with the Rambos until late November or December of 1984. On numerous occasions during this period, Susan Rambo heard defendant refer to "snitches." Once defendant told her, "You know what happens to snitches," then removed a butcher knife from a magnetic rack on her kitchen wall and, declaring the knife to be "just about right," made several stabbing or slashing motions. She testified that on another occasion, defendant popped open a switchblade knife that "he would play with . . . constantly," and used it to stab a cardboard box that she was carrying. Defendant also told her that the ghost of Maureen Bautista was haunting him.

Susan Rambo testified that defendant moved out of the Ramos' residence in late 1984, to a trailer house on her father's property in Parkfield, where defendant continued to manufacture methamphetamine in the course of the ensuing few months.

Harlyn Codd testified that in February 1985, he and defendant were watching a violent movie at Codd's residence in Porterville, and that defendant confessed to having committed the Bautista murders. According to Codd, the movie nauseated defendant, who remarked that the film reminded him of what had happened to Maureen Bautista and to "the kid." Defendant stated to Codd that he had "offed" the Bautistas by "cut[ting] them up."

7. The murder of Greg Rambo, and the disposal of his body

Although the present appeal does not involve defendant's conviction for the murder of Greg Rambo (see fn. 2, ante), the jury heard evidence, summarized below, related to that murder. Much of this evidence was introduced by the defense during its cross-examination of

---

throughout the residence, and those depicting defendant were missing. Defendant's clothes were gone. Also missing were Maureen's automobile and stereo and Telesforo's computer.

prosecution witnesses, in an effort to undermine the witnesses' credibility by introducing evidence of their odd behavior, complicity, and deception in the aftermath of Greg Rambo's murder.

Susan Rambo testified (on cross-examination) that her husband had pistol-whipped her and placed a handgun to her head on January 23, 1985, because he was angry over her failure to notice a pickup truck that had parked in their backyard. She testified: "He told me he would give me five minutes to get my stuff and get out." The Rambos separated, and Susan went to live with her parents in Parkfield.

Susan Rambo further testified that she last had seen her husband alive on February 19, 1985 – on an occasion when he was in a rage. On the following day, defendant telephoned her to say her husband would "never bother her again." She feared defendant's comment meant her husband was dead. Defendant requested that she acquire a tarp or some other object that could be used to dispose of various items (which he did not identify), and she obtained a sleeping bag. Defendant also asked to borrow her father's bulldozer to dig a hole, but her father refused.

Harlyn Codd testified that in February 1985, defendant telephoned him and said, Greg's dead. I killed him." According to Codd, defendant told him he had shot Rambo three times.[8]

Because Codd was intoxicated at the time of defendant's telephone call, Codd refused defendant's invitation to visit him that day in Parkfield. Codd met defendant the following day, and the two of them went to Parkfield to retrieve Greg Rambo's body from a shed. Codd testified that defendant feared Rambo "was going to be a snitch and he offed him." Rambo's body was wrapped in a sleeping bag and a blanket when Codd saw it.

Resolving to move the body at a later date, defendant and Codd proceeded to defendant's trailer, where defendant freebased

---

8. Leonard Miller, a Tulare County pathologist, testified that Greg Rambo had been shot three times and had died from a gunshot wound to the heart. Miller opined that a gunshot wound to the back of the victim's neck had been fired from a distance of only a few inches, and was the last of the three shots.

cocaine. Codd also ingested cocaine in order to remain awake, because he did not trust defendant.

Codd further testified defendant said he "wanted to cut [Rambo's body] up, stick dynamite in him and blow it up, cut his hands off, knock his teeth out, disfigure him to leave no identification marks or anything . . . so [Rambo] couldn't be identified." Instead, the pair drove to Tulare County, deposited Rambo's body in an orange grove, and returned thereafter to Codd's residence. The following morning, Codd and defendant retrieved Rambo's body, transported it to an isolated section of the county, and dumped it in a ravine known as Deer Creek Canyon. Codd acknowledged selecting the site and on cross-examination stated that after defendant's arrest, he led sheriff's deputies to the spot where he and defendant had dumped the body.[9]

Wayne James testified that at some point after selling defendant a vehicle in February 1985, defendant threw him a spent .38 cartridge, telling James it was the shell that had killed Greg Rambo. Defendant informed James that he and Harlyn Codd had disposed of Rambo's body the previous evening in a ravine located outside Porterville.

On March 3, 1985, in view of Greg Rambo's extended absence from the Shandon residence he had occupied with his wife Susan, she filed a missing person's report with the San Luis Obispo County Sheriff's Department. She testified on cross-examination that despite her awareness (on that date) of evidence suggesting her husband's violent demise, she nonetheless was not certain at that time that he was dead, and simply "did not know where he was." She acknowledged being the beneficiary of her husband's $100,000 life

---

9. Defense counsel sought to impeach Codd on cross-examination by eliciting testimony from him that during Codd's initial conversations with sheriff's deputies regarding Greg Rambo's death, Codd failed to mention that defendant had confessed the Bautista murders to him. Codd also admitted that when law enforcement personnel initially asked him whether he knew anything about Greg Rambo's murder, he had lied, denying any such knowledge.

insurance policy, and telling defendant she needed to locate her husband's body in order for her to be able to collect the insurance proceeds.

Susan Rambo also acknowledged that after cleaning up the Parkfield shed that had concealed her husband's body prior to its removal by defendant and Harlyn Codd, she assisted friends in searching for her husband. She acknowledged telephoning her husband's answering machine several times in the presence of other persons in an effort to fool them into believing she was attempting to locate him. She testified she engaged in the foregoing unusual activity and refrained from calling the authorities, because she feared defendant, Whittington, and Whittington's brother, Bill, each of whom, she said, "carried machineguns and automatic weapons."

8. Defendant's arrest

Susan Rambo testified that near the end of February 1985, she was "very upset," and defendant told her he did not believe she "was going to hold up in front of questioning or . . . be able to keep up [her] part." She stated that defendant gave her his driver's license, admonishing her: "Here, I want you to be sure and get my name right if you snitch, if you go to the cops." Susan Rambo interpreted defendant's remark – made as his gun lay on the bed near them – as an odd and "rather macho" dare. She replied that she was attempting to stay out of town so as to avoid questions and the possibility of breaking down and becoming a "snitch." Defendant told her he was "ready for the gas chamber . . . ready any time."

On March 6, 1985, Susan Rambo contacted the Kern County Sheriff's Department. Her statements led two days later to the excavation, by law enforcement officials, of two decomposed bodies located inside a dresser buried beneath a layer of cement behind the Rambos' residence. Dental records confirmed that the bodies were those of Maureen and Telesforo Bautista.

Defendant was arrested at a coffee shop in Gorman on March 14, 1985, claiming at the time that his name was Richard Brokaw, a name he had used in registering at a nearby motel. Defendant's wallet contained documents or identification in five names, including his own

and that of Greg Rambo. A search by law enforcement officers of defendant's vehicle and motel room resulted in the seizure of several types of ammunition, including three boxes of high power .38-caliber ammunition, loose cartridges, a clip, and shotgun shells.

Shortly after his arrest, defendant telephoned Codd, stating that defendant had been "snitched off" and was "going to get the pill."

9. Physical evidence

Dr. Karl Kirschner, a forensic pathologist, testified that he conducted autopsies on the Bautistas' bodies on March 9, 1985, one day after law enforcement officials had exhumed the bodies. He opined that the bodies had been buried for at least four months. Narrow cuts in the victims' clothing suggested that the victims had been stabbed repeatedly. Kirschner testified that the larger body (Maureen's) had been stabbed 11 times in the chest, and he opined the victim had died as a result of those wounds. Because each of the wounds pierced the chest cavity, Kirschner believed "any one of them could have been fatal." Kirschner also stated that while this victim still was alive, she suffered two stab wounds in her jaw. Kirschner testified that the smaller body (Telesforo's) had been stabbed five times in the chest and twice in the back.

Expert witnesses testified that blood spatters identified in Patricia Shepard's corner bedroom were consistent with the infliction of stab wounds and with the victims' blood types, and that the spatters also indicated the presence of commercial detergent products. A bloodstain extending more than five feet across the living room carpet suggested that a bloody body had been dragged across the floor. Carpet fibers found within the dresser were consistent with those obtained from Shepard's apartment.

10. Defendant's statement "They can only gas me once"

Richard Lee, an investigator for the Monterey County District Attorney, testified that on April 4, 1985, defendant, while incarcerated in the Monterey County jail (in connection with the Parkfield murder of Greg Rambo), asked, "So you guys aren't going to

try me; is that right?" Lee replied that defendant would be tried in Kern County for the Bautista killings committed in Bakersfield, and in Monterey County for the Rambo killing. Defendant responded, "They can only gas me once. They can only take my wheels one time. Do you know what I mean?" Lee responded, "Come on Bob, that's negative vibes." Defendant laughed and said, "Yeah, negative vibes, that's right. I'm still breathing and there's a few people who ain't." Defendant then laughed again.

B. The defense case

The defense sought to establish that participants in the Shandon drug operation, other than defendant, had a financial motive that might have led one or more of them to commit the Bautista murders, as well as the murder of Greg Rambo. With that objective, the defense introduced the testimony of 15 witnesses in an effort to cast doubt upon the credibility of key prosecution witnesses whose testimony had implicated defendant in all 3 murders. In particular, the defense offered testimony aimed at impugning the credibility of Whittington by highlighting his evasive and occasionally contradictory pretrial testimony. The defense also introduced testimony directed at undercutting Susan Rambo's credibility as a prosecution witness by highlighting her odd behavior in the immediate aftermath of her husband's disappearance. The defense additionally sought to suggest that Susan Rambo might have been involved in her husband's murder, and that her motivation to hasten his demise had been fueled by lust and greed – a desire to pursue an intimate relationship with defendant, and a desire to collect on her husband's life insurance policy.

II. PENALTY PHASE EVIDENCE

A. The prosecution's case

The prosecution introduced stipulations it had entered into with the defense establishing that defendant had been convicted of second degree burglary in 1972 and possession of a silencer in 1981, both felonies. Over objections of defense counsel, the prosecution also

introduced the testimony of witnesses regarding defendant's possession of firearms in 1981 and 1982, and his involvement in an alleged kidnapping that occurred in 1982. We briefly summarize the prosecution's evidence regarding the firearms and the kidnapping.

Douglas Gerst, a police officer employed by the City of Los Angeles, testified that in 1981, during two searches of a residence located in Canoga Park, he recovered numerous weapons, including a Mac Ten machinegun (with silencer), two automatic pistols, six revolvers, six rifles, and twelve shotguns. The prosecution introduced photographs of the machinegun and silencer. Gerst testified that thousands of rounds of ammunition were found inside the residence. Utility receipts established that the premises were defendant's residence.

Diane Sems described an incident in June 1982 in which an acquaintance of hers, Terry Fabricant, forced her into a pickup truck that was driver by another man. Sems was blindfolded, driven to a residence that she did not recognize (and where she observed guns), and forced by Fabricant to ingest drugs. After Fabricant fell asleep a few hours later, she escaped; the next day, no longer under the influence of drugs, she identified the driver of the pickup truck in a police photo lineup. Sems testified that defendant resembled the driver of the pickup truck, although she was uncertain and, in fact, acknowledged on cross-examination that she could not identify the driver.

To bolster Diane Sems's testimony, the prosecution introduced the testimony of Terry Fabricant, who stated that he had been an acquaintance of defendant's in June 1982 and that defendant drove a pickup truck at that time. Fabricant was not questioned (and did not testify) regarding the facts underlying the alleged kidnapping.

To further corroborate Sems' story, the prosecution introduced the testimony of Philip Quartararol, a police detective employed by the City of Los Angeles. Quartararol testified that he had conducted the photo lineup recalled by Sems, that Sems had identified defendant during that lineup, and that Sems did not appear at that time to be under the influence of drugs. Quartararol also testified that he had obtained a search warrant for the same residence that Officer Gerst had searched one year earlier, and in the ensuing search had recovered two semiautomatic weapons, two shotguns, and several thousand rounds of ammunition. On cross-examination, Quartararol acknowledged that,

under the law in effect at the time he conducted the search in 1982, a felon's possession of the firearms he discovered was not illegal, because the weapons were not concealable.

B. The defense case

At the penalty phase, the defense presented evidence in mitigation relating to defendant's prison history, his upbringing and character, and his cordial relationship with a woman and her young daughter.

A document summarizing defendant's prison history indicated that defendant had adjusted well to prison. Defense counsel argued that this document demonstrated that defendant had been a "model prisoner."

The testimony of Russell Garceau, defendant's younger brother, was introduced in an effort to demonstrate positive attributes on the part of defendant as well as the repeated adversity that defendant had faced throughout his life. This testimony indicated that defendant had been an intelligent child, had won poetry and art contests, and was an avid reader. As a youth, defendant developed bone disease in his ankle that required frequent hospitalization and caused defendant to miss "quite a bit of his childhood."

Defendant's brother testified that his father had collected firearms, and when defendant was enrolled in junior high school, defendant had brought a gun to school and then, deciding that was the wrong thing to do, had given it to a school administrator with whom defendant had maintained a good relationship. According to this testimony, defendant was arrested and placed in a detention hall, where he frequently was beaten.

Defendant's brother further testified that at 16 years of age, defendant joined the Army, serving both domestically and in Vietnam, after which he was honorably discharged in 1968. Upon defendant's return from Vietnam, he seemed embittered and began to commit burglaries, leading to his arrest and imprisonment. Defendant had been proud to be "one of the few [inmates not] involved in violence or dope."

In 1976, defendant rented three or four acres of land in

Chatsworth, set up a horse ranch, and attempted to start a hayriding business. Defendant's brother believed that defendant was not involved in criminal activity during the two or three years he lived on the ranch, and that he had not owned any guns during this period. When the land thereafter was sold, defendant was compelled to sell his possessions and leave the ranch.

Defendant's brother further testified that defendant had a generous nature, noting, for example, that "he used to borrow money from me to give to the blind man . . . ." Defendant always had repaid his debts, and made three years of automobile loan payments for the widow of a deceased business partner. Defendant often forgave loans that he had made to others. After his father's death, defendant visited and kept in touch with his mother, who resided in Ohio.

Defendant's brother testified that during the 1980's, defendant "started on drugs . . . that's when I saw his whole personality change . . . . Up to that time I thought he was probably the most honorable person I had ever met . . . . Then he started getting involved in cocaine and then all of a sudden he wouldn't show up when he was supposed to, he wasn't paying back like he used to pay back his loans and in a sense, to me, became flaky, his whole life seemed to change at that time. . . ."

The defense also introduced the testimony of Starr Calliez, who described defendant as being "very sensitive [and] very considerate." Calliez stated that in 1973, she was an acquaintance of defendant's brother, who mentioned at that time that he had a brother in prison. Calliez began corresponding with defendant, visited him in prison many times, and developed an intimate relationship with him following his release. Calliez stated that defendant was "very friendly and nice" to her six-year old daughter, buying her gifts, and that the three of them engaged in activities as a family. Calliez acknowledged that defendant had not adjusted easily to life outside prison but noted that during their relationship, she never had known defendant to use drugs or resort to violence.

Calliez's close relationship with defendant ultimately ended, and thereafter, in 1983, she married someone else. Calliez was "shocked" to learn of defendant's possible involvement in the illegal activities described at trial. Notwithstanding the evidence establishing

defendant's murder of a mother and a child, Calliez still would feel comfortable in the event she and her daughter were to be alone in defendant's company.

DISCUSSION

I. JURY SELECTION ISSUES

A. Alleged Wheeler error

Defendant contends the prosecutor employed peremptory challenges purposefully to exclude Hispanic-surnamed women from the jury, and that the trial court committed prejudicial error in denying defendant's motions for mistrial based upon our decision in People v. Wheeler (1978) 22 Cal.3d 258.

The prosecutor exercised peremptory challenges to remove the following prospective jurors: Sharon Montoya, Dolores Nejera, Jane Chavez, Lucy Martinez, and Hope Vasquez. Immediately following the excusal of Vasquez, defense counsel moved for a mistrial on the ground that the prosecutor improperly had exercised peremptory challenges on the basis of group bias, resulting in the purposeful exclusion of Hispanic-surnamed women. Defense counsel made a second motion for mistrial pursuant to Wheeler immediately following the prosecution's exercise of a peremptory challenge against Rita Asuncion, the sixth and sole remaining Hispanic woman on the panel.

The trial court denied the Wheeler motions, finding in each instance that defendant had failed to establish a prima facie case of discrimination. (See People v. Wheeler, supra, 22 Cal.3d at p. 280.)

On appeal, defendant contends that the trial court erred in denying his motions for mistrial. As we shall explain, we reject defendant's argument, because the record supports the trial court's findings that a prima facie case of discrimination was not established.

Recently, in People v. Sims (1993) 5 Cal.4th 405, 428, we restated the applicable law: "Under the principles articulated in Wheeler, supra, 22 Cal.3d 258, 276-277, a party may not employ peremptory challenges to remove prospective jurors solely on the basis of group bias. Group bias is a presumption that jurors are biased merely

because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds. (Wheeler, supra, 22 Cal.3d at p. 276; People v. Fuentes (1991) 54 Cal.3d 707, 713 [286 Cal.Rptr. 792, 818 P.2d 75]; see Powers v. Ohio (1991) 499 U.S. ____ [113 L.Ed.2d 411, 111 S.Ct. 1364].) 'If a party believes an opponent is improperly using peremptory challenges for a discriminatory purpose, that party must make a timely objection and a prima facie showing that the jurors are being excluded on the basis of group bias. [Citation.] To establish a prima facie case, the moving party should first make as complete a record as possible; second, the moving party must establish that the persons excluded are members of a cognizable group; and third, the moving party must show a strong likelihood that the persons are being excluded because of group association.' (Fuentes, supra, 54 Cal.3d at p. 714.) Once the moving party has established a prima facie case, the burden shifts to the other party to come forward with a group-neutral explanation for the exercise of the challenges related to the particular case being tried. (Wheeler, supra, 22 Cal.3d at pp. 281-282; Fuentes, supra, 54 Cal.3d at p. 714.)"

In the present case, defendant's motions for mistrial were timely made. Also, we assume that defendant is correct in asserting, without challenge by the People, that Hispanic-surnamed women constitute a "cognizable group" under Wheeler. (See People v. Clair (1992) 2 Cal.4th 629, 652; People v. Motton (1985) 39 Cal.3d 596, 605-606 [Black women are a cognizable subgroup]; see also People v. Trevino (1985) 39 Cal.3d 667, 686 [Hispanics are a cognizable group for purposes of Wheeler], disapproved on another point in People v. Johnson (1989) 47 Cal.3d 1194, 1219-1221.) Nevertheless, defendant failed to show a "strong likelihood" that these prospective jurors were excluded because of a group association. His motions merely reiterated the names of the jurors removed by the prosecution and alleged that, because the removed jurors all were Hispanic-surnamed women, he had made a "prima facie showing."

Thus, the factual context underlying defendant's motions resembled that described in People v. Howard (1992) 1 Cal.4th 1132, 1154. In Howard, the defendant relied solely upon the circumstance that the prosecutor's peremptory challenges had been directed toward the only two Black jurors. (Ibid.) In this case, as in Howard, the defendant

"did not make any effort to set out the other relevant circumstances, such as the prospective jurors' individual characteristics, the nature of the prosecutor's voir dire, or the prospective jurors' answers to questions." (Ibid.)

"[W]hen a trial court denies a Wheeler motion without finding a prima facie case of group bias the reviewing court considers the entire record of voir dire. [Citations.] As with other findings of fact, we examine the record for evidence to support the trial court's ruling. Because Wheeler motions call upon trial judges' personal observations, we view their rulings with 'considerable deference' on appeal. [Citations.] If the record 'suggests grounds upon which the prosecutor might reasonably have challenged' the jurors in questions, we affirm. [Citation.]" (People v. Howard, supra, 1 Cal.4th at p. 1155.)

The trial court observed that there were grounds upon which the prosecutor reasonably might have challenged the jurors in question: "Certainly as to Mrs. Vasquez, she repeatedly claimed hardship and was very dissatisfied when I told her she couldn't be excused. I don't see why the People should be required to keep her. . . . I know Mrs. Chavez had medical problems, we had a hard time getting her in, she wanted to be excused. Martinez was very difficult getting her in, Najera was in her first trimester of pregnancy and Montoya I just don't recall."

The record supports the trial court's denial of defendant's motions. Based upon hardship, Hope Vasquez expressed reluctance to serve as a juror, mentioning a logistical difficulty related to the transportation of her daughter to school and her own travel to court for the trial. Dolores Nejera stated that some members of her family had run afoul of the law and had been incarcerated; one was a fugitive. Sharon Montoya expressed strong reservations relating to the responsibility she would face in the event the trial reached the penalty phase, indicating she did not believe anyone had the right to take the life of another person, and expressed concern based upon having heard of "innocent people being sentenced all the time." Lucy Martinez's contradictory responses to questions presented to her during voir dire examination suggested that she might have difficulty comprehending the questions. Jane Chavez also provided contradictory responses regarding her views on the death penalty, stated that she found the law confusing and probably would

forget testimony, and opined that serving as a juror in this case "would be awful." Rita Asuncion, whose removal led to defendant's second Wheeler motion, indicated it was difficult for her to understand the concept of reasonable doubt, as well as the distinction between the guilt and penalty phases of the trial.

Defendant contends that the trial court's observations regarding the presence of other Hispanic-surnamed individuals who remained on the panel suggest that its denial of defendant's Wheeler motions stemmed from the court's failure to recognize Hispanic-surnamed women as a cognizable class. We disagree. The record is clear that the trial court's denial of defendant's motions for mistrial was based upon its consideration of the individual jurors' responses on voir dire, and the record is sufficient to support the trial court's conclusion that a prima facie case of discrimination was not established. We conclude the trial court properly found that defendant failed to satisfy the Wheeler requirement that he establish a prima facie case of discrimination. (See People v. Howard, supra, 1 Cal.4th at pp. 1153-1156; People v. Hayes (1990) 52 Cal.3d 577, 605-606; People v. Bittaker (1989) 48 Cal.3d 1046, 1092 [prima facie case of discrimination not established where challenged jurors' responses indicated a proper basis for their excusal]; see also People v. Sims, supra, 5 Cal.4th at pp. 428-432.)

We also reject defendant's claim of federal constitutional error involving his rights to a fair trial and to equal protection of the laws. Having failed to raise the Sixth Amendment claim below, defendant has waived this issue. (People v. McPeters (1992) 2 Cal.4th 1148, 1174.) Each claim also is substantively deficient; although defendants have a right to a jury drawn from a fair cross-section of the community, they have no right to a jury that reflects the racial composition of the community. (Holland v. Illinois (1990) 493 U.S. 474, 480, 482-483; see also Taylor v. Illinois (1975) 419 U.S. 522, 538.) Defendant's equal protection claim lacks merit because, as discussed above, the trial court's finding that defendant failed to make a prima facie showing that the jurors were excluded on the basis of group bias is supported by the record. (Cf. Johnson v. Vasquez (9th Cir. Sept. 2,

1993) ____ F.2d ____ [Dock, No. 91-56395].)[10]

B. Alleged wrongful failure to exclude jurors for cause

Defendant contends the trial court improperly denied defense motions to excuse for cause three prospective jurors who possessed views favoring the death penalty that defendant alleges would have impaired their ability to be fair and impartial. The three prospective jurors never were impaneled, however, having been excused following defendant counsel's exercise of peremptory challenges against them. Defendant nonetheless argues that the trial court's failure to exclude these prospective jurors for cause violated his rights to a fair and impartial jury under the federal and state Constitutions.

Both constitutions guarantee a defendant a trial by an impartial jury. (Williams v. Superior Court (1989) 49 Cal.3d 736, 739-740.) A juror may be challenged for cause based upon his or her views of capital punishment if those views would prevent or substantially impair the performance of the juror's duties in accordance with the court's instructions and the juror's oath. (Wainwright v. Witt (1985) 469 U.S. 412, 424.) A defendant who claims that the trial court wrongly denied a challenged for cause must demonstrate that his or her right to a fair and impartial jury was affected. (People v. Bittaker, supra, 48 Cal.3d at pp. 1087-1088.)

Defendant fails to make the requisite showing. At the time the jury was sworn, he had 16 peremptory challenges remaining. Thus, defendant cannot demonstrate that his ability to excuse peremptorily any other juror was affected by his decision to exercise peremptory challenges against the three jurors in question. (People v. Raley (1992) 2 Cal.4th 870, 904-905; People v. Kelly (1992) 1 Cal.4th

---

10. Throughout this opinion, we shall discuss the merits of particular claims, such as this one, even though they are procedurally barred, when we conclude that such discussion may be helpful in evaluating future claims alleging ineffective assistance of counsel. (See People v. Mitcham 91992) 1 Cal.4th 1027, 1044, fn. 5.)

495, 518-519; People v. Howard (1988) 44 Cal.3d 375, 419, fn. 17.)

Because defendant did not exhaust his peremptory challenges, he must justify his failure to do so. (People v. Bittaker, supra, 48 Cal.3d at pp. 1087-1088.) He contends the presence of five other "pro-death" persons remaining among the jury venirepersons on the panel inhibited defense counsel's exercise of peremptory challenges. We rejected a similar argument in People v. Price (1991) 1 Cal.4th 324, 401-402, noting that defendant had failed to demonstrate that exhausting his remaining peremptory challenges would have led to the seating of a juror subject to removal for cause. In the present case, if defendant was dissatisfied with the jury as comprised, he could have exercised his remaining peremptory challenges, regardless of the views of venirepersons yet to be impaneled. No error appears.[11]

C. Alleged Witt error

Defendant contends the trial court erred when it dismissed

---

11. Even if defendant's argument were devoid of the procedural deficiencies discussed above, we would find it substantively deficient. The responses of the three prospective jurors, Maria Kinde, Richard Rodriguez, and Jerry Shipman, suggest, at most, the views of persons inclined to impose the death penalty for deliberate killings, but able to set aside such personal beliefs in favor of a careful review of the evidence, guided by the trial court's instructions. Kinde stated during voir dire that she believed the death penalty should be imposed for deliberate and premeditated killings, but also stated that she could be convinced by mitigating evidence to spare a defendant's life. Similarly, although Rodriguez stated that he supported the death penalty as a means of punishment, he also stated that whether or not a death verdict should be imposed would depend upon the circumstances of the case. Finally, although Shipman stated that he favored the death penalty, he also stated that he would consider the evidence and would not hesitate to follow the law.

for cause prospective juror Cathy Wilken. During voir dire examination, Wilken explained she had a "bias" against the death penalty and did not believe she could vote in favor of a death verdict. Her responses nonetheless were somewhat equivocal; she acknowledged the possibility she could vote in favor of the death penalty. When asked whether she could evaluate penalty phase evidence pursuant to the trial court's instructions and vote in favor of the death penalty if that were the appropriate punishment, however, Wilken replied, "I truly don't know."

In excusing Cathy Wilken, the trial court relied upon Wainwright v. Witt, supra, 469 U.S. 412, in which the United States Supreme Court held that a juror is disqualified from serving in a capital case if his or her views regarding the death penalty would "'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (Id. at p. 424, fn. omitted.) This court has adopted the Witt standard. (People v. Ghent (1987) 43 Cal.3d 739, 767.) Our task on review is to determine whether the trial court's finding that the juror's beliefs would "substantially impair the performance" of the juror's duties is fairly supported by the record. (People v. Johnson, supra, 47 Cal.3d at p. 1223 [quoting Darden v. Wainwright (1986) 477 U.S. 168, 175]; see also People v. Cox (1991) 53 Cal.3d 618, 646-647; People v. Daniels (1991) 52 Cal.3d 815, 875.)

The performance record supports the trial court's finding. Wilken's responses indicated she was troubled by the prospect of sitting on a penalty phase jury and was uncertain whether she could set aside her bias against the death penalty in favor of weighing the evidence and following the trial court's instructions. Under these circumstances, the trial court properly could find that her views would "substantially impair the performance" of her duties at the penalty phase. Accordingly, no error appears.

D. Cumulative effect of assigned errors

Defendant contends the cumulative effect of the alleged jury-selection errors warrants reversal. In view of our foregoing discussion finding no error, we reject this contention.

II. GUILT PHASE ISSUES

A. Defendant's motion to strike "the Nash testimony"

At the conclusion of the prosecution's case-in-chief, the defense moved to strike the testimony of prosecution witnesses Eddie Nash, Tony Sylvester, Ronald Coen, and Michelle Christie (whose collective testimony we refer to as "the Nash testimony"). The motion to strike was made upon relevancy grounds and under Evidence Code section 352.[12] Outside the presence of the jury, the parties argued the relevancy of the evidence, and whether the evidence unfairly sought to establish defendant's "guilt by association" with Nash, a man defense counsel described as "obviously disreputable." The trial court denied the motion to strike, accepting the prosecution's argument that the testimony was relevant to three distinct issues – defendant's motive, defendant's state of mind, and the corroboration of other witnesses' testimony. The trial court found that the evidence was not unduly prejudicial.

On appeal, defendant contends the trial court committed reversible error in denying his motion to strike. Defendant argues this evidence was irrelevant under Evidence Code section 210, and even if the evidence was relevant, the trial court abused its discretion under Evidence Code section 352 because the probative value of the evidence was substantially outweighed by the possibility it would unduly prejudice defendant. We shall address these contentions in turn.

1. The evidence satisfied Evidence Code section 210

---

12. Defense counsel had objected on the grounds of relevancy and Evidence Code section 352 prior to the prosecution's direct examination of Tony Sylvester. The trial court overruled the objection. During the prosecution's direct examination of Eddie Nash, defendant objected on the same two grounds to questions pertaining to a dead (allegedly murdered) body found in Nash's home. This objection also was overruled. Defendant also raised relevancy objections at various points during the testimony of Ronald Coen and Michelle Christie, and virtually all of these objections were overruled.

The central issue at trial was the identity of the person who fatally stabbed Maureen and Telesforo Bautista. The prosecution sought to establish that defendant had both the motive (fear of "snitches") and the opportunity (time spent alone with the victims, and their trust of him) to commit the murders. The prosecution offered the "Nash testimony" in order to help establish the identity of the killer, insofar as the evidence suggested that: (1) defendant had a motive to kill Maureen; (2) defendant's state of mind could have led him to commit the killings; and (3) the "Nash testimony" corroborated the testimony of other prosecution witnesses. In contrast, the defense theory was that defendant was not the perpetrator of the killings, that he lacked the motive to commit the crimes in view of his close relationship with the victims, and that the killings more likely were committed by a third party, such as Larry Tom Whittington, who was involved in a lucrative drug operation and had no personal relationship with the victims.

In determining the admissibility of the challenged evidence, we apply well-settled rules. Only relevant evidence is admissible. (Evid. Code § 350; People v. Babbit (1988) 45 Cal.3d 660, 681.) Relevant evidence is defined in Evidence Code section 210 as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." The test of relevance is whether the evidence tends "logically, naturally, and by reasonable inference" to establish material facts such as identity, intent, or motive. (People v. Daniels, supra, 52 Cal.3d at p. 856; People v. Alcala (1984) 36 Cal.3d 604, 631.) The trial court retains broad discretion in determining the relevance of evidence. (People v. Babbitt, supra, 45 Cal.3d at p. 681.)

The "Nash testimony" was relevant to demonstrate defendant's motive for killing the Bautistas and to establish premeditation, in view of defendant's frequently voiced hatred of "snitches" and his expressed fear that Maureen Bautista would "snitch him off" to Eddie Nash. The "Nash testimony" suggested that defendant's motive in killing the Bautistas was self-preservation – a desire to avoid having Nash, a man with a reputation for violence, learn of defendant's whereabouts and activities. In the absence of physical evidence linking defendant to the Bautista killings, the presence of a motive was particularly significant in this case. (See People v.

Edelbacher (1989) 47 Cal.3d 983, 1027-1028 [evidence of spousal rape charge of which defendant was acquitted held relevant to issue of motive in prosecution for murder of the spouse]; People v. Thompson (1988) 45 Cal.3d 86, 109 [motive an important issue where defense asserts that defendant and victim had a good relationship].) We therefore discern no error in the trial court's determination that the "Nash testimony" was relevant.

2. The "Nash testimony" was not unduly prejudicial

Defendant contends that even if the "Nash testimony" were relevant, the trial court committed reversible error in failing to exclude it as unduly prejudicial pursuant to Evidence Code section 352.[13] Defendant further contends that, contrary to the admonition contained in numerous decisions of this court (see, e.g., People v. Edelbacher, supra, 47 Cal.3d 983, 1016-1017, and cases cited), the trial court failed to state on the record that it had weighed prejudice against probative value.

The basis for defendant's motion to strike pursuant to Evidence Code section 352 was his assertion that the prosecution improperly sought to link defendant with Nash based upon testimony likely to compel the jury to speculate as to defendant's guilt by reason of Nash's illegal activities, reputation, and previous encounters with the law. In opposing the motion, the prosecution relied upon this court's decision in People v. Wright (1985) 39 Cal.3d 576, 585, in which we adopted the following view: "'The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against . . . [one party] as an individual and which has very little effect on the issues.'" (Id., quoting People v. Yu (1983) 143

13. Evidence Code section 352 provides:

"The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create the substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

Cal.App.3d 358, 377; see also People v. Karis (1988) 46 Cal.3d 612, 638.) After hearing the parties' arguments as to the alleged probative value and prejudicial effect of the "Nash testimony," the trial court took the matter under submission, noting on the record four days later that it was denying the motion based upon the prosecution's arguments and would consider giving the jury a limiting instruction.[14]

We discern no error in the trial court's ruling. The admission of the "Nash testimony" did present a risk of undue prejudice to defendant in view of Nash's criminal conduct, his violent reputation, and his prior association with defendant. Nevertheless, the danger that the jury might rely upon the "Nash testimony" for an improper purpose (for example, to conclude that defendant also was a violent individual) was minimized by the trial court's decision to give a limiting instruction. That instruction directed the jury to consider the "Nash testimony" only if it tended to establish the identity and the motive of the perpetrator of the killings, defendant's state of mind at the time of the killings, corroboration of other evidence, or the credibility of any other witness. The instruction directed the jury not to consider the "Nash testimony" as proof that defendant had a bad character or a disposition to commit crimes. Under these circumstances, we conclude that the risk of undue prejudice was not great.

By contrast, the probative value of the "Nash testimony" was considerable, because it bore directly upon the issue of defendant's motive to kill the Bautistas. In light of the testimony that defendant had told others that he feared Maureen Bautista would inform Eddie Nash of defendant's whereabouts, evidence pertaining to Nash's past criminal conduct and violent reputation plainly was of substantial importance in explaining why defendant might have killed a close acquaintance and her son. Moreover, the trial court's limiting instruction rendered it unlikely that the testimony establishing defendant's former association with Nash would evoke an emotional bias against defendant. Although the "Nash

14. Defendant challenges the adequacy of the limiting instruction that the trial court ultimately gave to the jury. We address this argument, post, pages ___ - ___ [typed maj. opn. pp. 72-74].

testimony" might have been damaging to defendant, it was not unduly prejudicial. (See People v. Karis, supra, 46 Cal.3d at pp. 637-638.)

We conclude that, in admitting the "Nash testimony," the trial court did not abuse its discretion under Evidence Code section 352, because it properly could find that the probative value of the testimony outweighed its prejudicial effect.

Nor do we discern error in the trial court's failure to provide a more precise description of the weighing process it engaged in pursuant to Evidence Code section 352. The parties argued at length the issue of alleged probative value versus prejudice. The trial court, after taking the matter under submission, denied defendant's motion to strike, stating: "The Court accepts the arguments of the People regarding the offer of the testimony. The Court will consider a limiting instruction. . . ." The record, including the trial court comments, sufficiently establishes that the court weighed and rejected the arguments of defendant. (People v. Claire, supra, 2 Cal.4th at p. 660; People v. Edelbacher, supra, 47 Cal.3d at pp. 1016-1017.)

B. Defendant's admission

Defendant contends the trial court erred in permitting Richard Lee to testify regarding his conversation with defendant at the Monterey County Jail, during which (according to Lee's testimony) defendant said: "They can only gas me once. They can only take my wheels one time. . . . I'm still breathing and there's a few people who ain't." Defendant argues that Lee's testimony was hearsay and, in the alternative, irrelevant. He further claims that the probative value of the testimony hinged upon unreasonable speculation that his comments to Lee evinced a consciousness of guilt, thereby abridging his right to due process of law under the federal and state Constitutions.

Defendant has waived any claim of error involving the admission of Lee's testimony, by reason of defense counsel's failure to object on the hearsay and relevancy grounds now raised on appeal (or on any other ground, for that matter). (Evid. Code, § 353, subd. (a); People v. Ghent, supra, 43 Cal.3d at p. 766.) Furthermore, even if defendant had raised a timely objection, his claim is substantively without merit, because the jury reasonably could have viewed defendant's statement to

Lee – a nonhearsay statement not offered for the truth of the matter asserted – as an implied admission of guilt. (See People v. Miranda (1987) 44 Cal.3d 57, 83-84 [defendant's actions at the time of his arrest were relevant to establish his consciousness of guilt and his knowledge of the magnitude of the crime]; People v. Mendoza (1987) 192 Cal.App.3d 667, 675-676 [defendant's statements were not hearsay, because they were not offered for the truth of the matters asserted, but "were properly characterized as admissions since an admission simply is any extrajudicial statement – whether inculpatory or exculpatory – 'which tends to prove his guilt when considered with the rest of the evidence'" (quoting CALJIC No. 2.71)].)

C. Admission of photographs and physical evidence

Over the objections of defense counsel, the trial court admitted into evidence a photograph depicting the victim's bodies shortly after they were unearthed, a photograph depicting a superficial depression of Maureen Bautista's sternum, which Dr. Karl Kirschner opined was the result of a knife wound, four small tissue samples taken from the victims, and Maureen Bautista's jawbone, demonstrating a penetrating stab wound. The prosecution offered the foregoing evidence to establish the identity of the victims, to corroborate the prosecution's expert testimony (that the victims had been killed in Patricia Shepard's apartment), and to establish that defendant had acted with malice.

In an effort to preclude admission of the challenged evidence, defense counsel offered to stipulate that Larry Tom Whittington assisted in placing the bodies in the dresser, that Maureen Bautista's death was caused by a blow of considerable force, that the jawbone had comprised part of her anatomy, and that the bodies unearthed were those of Maureen and Telesforo Bautista. After the prosecution rejected the stipulation, the trial court admitted the challenged evidence.

On appeal, defendant challenges the trial court's rulings on three grounds: (1) the evidence was irrelevant; (2) even if relevant, the probative value of the evidence was outweighed by its prejudicial effect, and therefore the evidence should have been excluded under Evidence Code section 352; and (3) the trial court, in exercising its

discretion under Evidence Code section 352, failed to engaged in a meaningful weighing of probative value against prejudice. Defendant implicitly contends that the trial court should have required the prosecution to accept the proffered stipulation.

The challenged evidence clearly was supportive of the prosecution's theory that the victims had been brutally murdered. (See People v. Wilson (1992) 3 Cal.4th 926, 937-938 [photos of murder victim depicting nature and placement of wounds relevant to prosecution's theory of deliberate killing].) Because the prosecution tried the present case on a theory of premeditated murder, the issue of malice was material, and the photographs and the jawbone were relevant to that issue. (See People v. Hendricks (1987) 43 Cal.3d 584, 594; People v. Frierson (1979) 25 Cal.3d 142, 171; 2 Witkin, Cal. Evidence (3d. ed. 1986) Demonstrative, Experimental and Scientific Evidence, § 837, pp. 801-804.) The tissue samples (extracted from the remains of the exhumed dresser, in which carpet fibers were found consistent with those found in Patricia Shepard's apartment) indicated the probability that the victims had bled in Patricia Shepard's apartment, and therefore were relevant to the prosecution's theory that the killings were deliberate, and that defendant attempted to conceal the crimes by transporting the bodies from the Bakersfield crime scene to the town of Shandon, where the victims surreptitiously were buried.

The evidence in question also was highly probative. The photograph of the mummified victims depicted their positions within the dresser (after the dresser had been unearthed and removed), thereby corroborating Whittington's testimony relating to concealment of the bodies. The photograph illustrating the superficial wound to Maureen Bautista's sternum was offered to establish that defendant employed different degrees of force during the fatal attack, and because the use of force was relevant to the question of malice, the trial court acted within its discretion in determining that the probative value of the photographs clearly outweighed any prejudice that might have been incurred by defendant as a result of their graphic nature. (See People v. Thompson, supra, 45 Cal.3d at p. 115-116 [no error in admitting photographs of victim's head and ear, through which fatal stab wound was inflicted]; People v. Ruiz (1988) 44 Cal.3d 589, 612-613 [no error in admitting "mummy-like" photos of victims].) Introduced as laboratory specimens

contained in small jars, the tissue samples were not readily identifiable as human tissue and, as noted, tended to support the prosecution's theory, supported by expert testimony, that the victims were killed in Patricia Shepard's apartment, then transported to Shandon. The appearance of Maureen Bautista's jawbone indicated that her assailant had stabbed her with sufficient force to enable the weapon to penetrate completely through the bone, strongly suggesting that the perpetrator acted with malice. We previously have upheld the admission of body parts over a defense objection similar to that raised in the present case, where the physical evidence is offered in corroboration of expert testimony (and where, presumably, photographs instead could have been utilized). The potentially shocking nature of such physical evidence is not, in itself, a basis for exclusion. (See People v. Thomas (1992) 2 Cal.4th 489, 524 [admission of teeth and bone fragments].)

Defendant contends the trial court failed to engage in a meaningful weighing process and, instead, mechanically recited that the probative value exceeded the prejudicial effect as to the various exhibits that the defense sought to exclude. With respect to each item of physical evidence challenged on appeal, however, the trial court heard arguments from both sides regarding relevance and prejudice before articulating that the probative value of the challenged evidence outweighed any prejudicial effect. The record indicates that the trial court understood and fulfilled its responsibilities under Evidence Code section 352. Nothing more was required. (See People v. Clair, supra, 2 Cal.4th at p. 660; People v. Griffin (1988) 46 Cal.3d 1011, 1027-1029.)

When respect to defense counsel's offer at trial, in an effort to have the actual evidence excluded, to stipulate to certain facts suggested by the challenged evidence, we reiterate the general rule that the prosecution in a criminal case "cannot be compelled to accept a stipulation if the effect would be to deprive the state's case of its persuasiveness and forcefulness." (People v. Edelbacher, supra, 47 Cal.3d at p. 1007, and cases cited.) The probative value of the challenged photographs, jawbone, and tissue samples (exhibits that we have reviewed) clearly extended beyond the scope of the defense's offers to stipulate. The prosecution therefore was not obligated to present its cases in the sanitized fashion suggested by the defense. (See People v. Pride (1992) 3 Cal.4th 195, 243.)

Based upon the foregoing, the trial court did not abuse its discretion in admitting the challenged physical evidence. (People v. Thomas, supra, 2 Cal.4th at p. 524; People v. Price, supra, 1 Cal. 4th at p. 441; People v. Ashmus (1991) 54 Cal.3d 932, 973-974.)

D. Sufficiency of the evidence

At the close of the prosecution's case-in-chief, the defense moved for a judgment of acquittal pursuant to section 1118.1, alleging that the prosecution's evidence was legally insufficient to sustain a conviction. The defense argued that the prosecution's key witnesses – Larry Tom Whittington, Susan Rambo, Patricia Shepard, Harlyn Codd and Wayne James – were accomplices as a matter of law in a drug conspiracy that resulted in the deaths of Maureen and Telesforo Bautista. Based upon the premise that a person cannot be convicted on the uncorroborated testimony of an accomplice (§ 1111), and upon the further premise that one accomplice cannot corroborate another (People v. Clapp (1944) 24 Cal.2d 835, 837), the defense argued that without the testimony of the accomplices, there would be no evidence supporting defendant's conviction. The trial court rejected these arguments and denied defendant's motion for a judgment of acquittal. In denying this motion, the trial court found that Wayne James was not an accomplice and reasoned that, even if it were to accept defendant's arguments regarding the accomplice status of other prosecution witnesses, James's testimony would provide sufficient evidence of corroboration.

On appeal, defendant reiterates his contention that his conviction rests upon the uncorroborated testimony of accomplices. As we shall explain, this contention is without merit.

In order for any one of the foregoing witnesses to have been an accomplice as a matter of law, the record must establish, as a matter of law, either that the witness aided and abetted defendant in committing the killings (§ 31; People v. Gordon (1973) 10 Cal.3d 460, 468) or was involved in a conspiracy in which that person harbored the intent to commit the offense that was the object of the conspiracy. (People v. Marks (1988) 45 Cal.3d 1335, 1345.) Neither theory was established as a matter of law by the evidence at trial.

Patricia Shepard obtained cleaning supplies after learning

of the killings and helped Larry Tom Whittington scrub the apartment where the killings had been committed. Whittington also helped conceal the victims' bodies. Susan Rambo provided aid in arranging for the victims' grave to be dug in her backyard. Although it is true that a person's post-offense acts are relevant to the issue whether he or she shared the requisite intent prior to the commission of the offense (People v. Brady (1987) 190 Cal.App.3d 124, 136), the evidence relating to these witnesses suggests that, at most, they were accessories. (§ 32; People v. Perryman (1987) 188 Cal.App.3d 1546, 1549.) No evidence connected these witnesses (or anyone else) to the actual killings. Nor did any evidence connect the other alleged accomplices, Harlyn Codd and Wayne James, to the killings or to defendant's subsequent coverup efforts. The aiding and abetting theory therefore fails for lack of evidence that any of the prosecution's witnesses assisted defendant in committing the killings.

Defendant contends that because his drug cohorts were aware of his threats to kill "snitches," they themselves also anticipated the victims' demise. Yet, the record clearly fails to establish, as a matter of law, that the killings were a "reasonably foreseeable" consequence of the methamphetamine manufacturing operation conducted on the Rambos' property. It is undisputed that the key prosecution witnesses were part of a drug conspiracy, but the evidence does not establish, as a matter of law, that the object of that conspiracy was the killing of Maureen and Telesforo Bautista. Rather, the record discloses only one instance prior to the killings – defendant's conversation with Harlyn Codd at Lake Isabella – in which defendant threatened, in the presence of any key witness, to kill "snitches."[15/] That single threat, overheard by Codd, does not demonstrate, as a matter of law, that Codd (or any other prosecution witness) was bound to defendant by a common plan to kill the Bautistas. (See People v. Rodriguez (1986) 42 Cal.3d 730, 760 [rejecting notion that a defendant's expression of an intent to kill before

---

15. Codd testified that defendant and Maureen "were freebasing and they were having an argument of some type. . . . He kept talking about how he was going to get rid of her, see, because she was snitching us off."

a crime necessarily renders the cohort an accomplice to murder].) Defendant's other comments to the key prosecution witnesses regarding "snitches" occurred after the killings. Thus, accomplice status cannot properly be accorded the prosecution's witnesses, as a matter of law, on a theory of derivative liability. (See People v. Croy (1985) 41 Cal.3d 1, 11-12, fn.5.)[16] Accordingly, we find no error in the trial court's denial of defendant's motion for a judgment of acquittal.

E. Instructional error

1. Special instruction No. 3: other-crimes evidence

In addition to hearing evidence pertaining to the deaths of Maureen and Telesforo Bautista, the jury received evidence pertaining to defendant's illegal drug activity and the murder of Greg Rambo. The parties proposed instructions regarding the purposes for which the jury could consider this evidence of defendant's other crimes.

The prosecution submitted special instruction No. 3, set forth in the margin.[17] The instruction was broadly written, directing the

16. For the reasons set forth in the above discussion, the trial court properly rejected defendant's request that the jury be instructed pursuant to California Jury Instructions, Criminal (4th ed. 1979) (hereafter CALJIC) No. 3.16, which would have informed the jury that one (or more) of the prosecution's witnesses was an accomplice as a matter of law.

17. The prosecution's special instruction No. 3 provided:

"Evidence has been introduced for the purpose of showing that the defendant committed other crimes other [sic] than that for which he is on trial.

"Such evidence, if believed, may be considered by you for any purpose, including but not limited to any of the following:

"His character or any trait of his character;

jury to consider the other-crimes evidence for numerous purposes, including defendant's "character or any trait of his character." Outside the presence of the jury, the prosecutor argued that the jury should be allowed to consider evidence, such as that pertaining to the murder of Greg Rambo, bearing upon defendant's character, because the defense had indicated at the outset of the case that it would not object to the introduction of such evidence.

The defense objected to the prosecution's proposed special instruction No. 3, arguing that it was overbroad, impermissible in view of Evidence Code section 1101's proscription against the use of character evidence to prove conduct, and premised upon a mischaracterization of the defense's stipulation regarding the prosecution's use of other-crimes evidence. The defense proposed instead that the trial court instruct the jury pursuant to CALJIC No. 2.50, set forth in the margin.[18] This instruction would have limited the jury's

"His conduct on a specific occasion;

"A characteristic method, plan or scheme in the commission of criminal acts similar to the method, plan or scheme used in the commission of the offense in this case which would further tend to show:

"The existence of any element of the crimes charged;

"The identity of the person who committed the crimes, if any, of which the defendant is accused;

"That the defendant had knowledge or possessed the means that might have been useful or necessary for the commission of the crime charged.

"You must weigh such evidence as you do all other evidence in this case."

18. CALJIC No. 2.50, as modified by the defense, would have provided:

"Evidence has been introduced for the purpose of showing that the defendant committed crimes other than that for which he is on trial.

consideration of the other-crimes evidence to establish motive or the existence of a conspiracy. It expressly would have prohibited the jury from considering such evidence to demonstrate that defendant had a bad character or a disposition to commit crimes.

After hearing the parties' arguments, the trial court rejected the defense request that the court instruct pursuant to CALJIC No. 2.50, ruling instead that it would give the prosecution's special instruction No. 3.

On appeal, defendant contends he was denied his right to due process of law when the trial court instructed the jury regarding other-crimes evidence pursuant to special instruction No. 3. Specifically, defendant characterizes as erroneous that portion of the instruction specifying that evidence of other crimes "if believed, may be considered by [the jury] for any purpose, including but not limited to any of the following: [¶] [Defendant's] character or any trait of his character. . . ." (Italics added.) In response, the People concede that the italicized portion of the instruction was overbroad, but argue that the reliability of defendant's trial was not undermined by the giving of this instruction.

Not withstanding the parties' agreement at the outset of the case to allow the admission of evidence pertaining to the murder of

---

"Such evidence, if believed, was not received and may not be considered by you to prove that he is a person of bad character or that he has a disposition to commit crimes.

"Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show:

"A motive for the commission of the crime charged; or,

"The existence of a conspiracy.

"For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you would do all other evidence in the case.

"You are not permitted to consider such evidence for any other purpose."

Greg Rambo, it is clear the trial court erred in giving the italicized portion of special instruction No. 3. Subject to certain exceptions inapplicable here, evidence pertaining to a defendant's character is inadmissible when offered to prove the defendant's conduct on a specific occasion. (Evid. Code, § 1101, subd. (a).)

In the present case, the italicized portion of the challenged instruction impermissibly invited the jury to consider certain evidence (e.g., that defendant killed Rambo) for the purpose of establishing defendant's propensity to commit murder. Assuming the jury considered such evidence in that context, the jury arguably might have inferred that because defendant had killed Rambo, defendant also was capable of killing other friends, such as Maureen and Telesforo Bautista. If the jury drew that inference, the prosecution's burden of proof as to the central issue in the case, the identity of the Bautistas' slayer, arguably was lightened, thus raising the possibility that defendant's constitutional right to due process of law was impaired. Because the People contend, under these circumstances, that the error is harmless under the state harmless-error analysis (People v. Watson (1956) 46 Cal.2d 818, 836), as well as under the more exacting federal standard, which requires us to analyze whether the trial court's error was harmless beyond a reasonable doubt (Chapman v. California (1967) 386 U.S. 18, 24), we shall assume, without deciding, that the Chapman standard is applicable. (Cf. Arizona v. Fulminante (1991) 499 U.S. ___ [113 L.Ed 302, 111 S.Ct. 1246] [federal constitutional "trial error," such as admission of an involuntary confession, is subject to the harmless-error analysis set forth in Chapman].)

In ascertaining the effect of the trial court's error, we consider the potentially devastating impact of other-crimes evidence that permits the jury to conclude that a capital defendant has a propensity to commit murder. Such evidence invites the jury to be swayed by speculation that, because the defendant previously has murdered, he or she also committed the charged murder. (See Michelson v. United States (1948) 335 U.S. 469, 475-476; People v. Smallwood (1986) 42 Cal.3d 415, 428) Thus, such evidence is inadmissible to establish a defendant's criminal disposition, but is admissible when relevant to another issue, such as opportunity or intent. (See People v. Miranda, supra, 44 Cal.3d 57, 82; see also Estelle v. McGuire (1991) ____ U.S.

____ [112 S.Ct. 475, 483-484] [jury instruction relating to prior-injury evidence did not constitute a "propensity instruction"].)

Unlike the more typical situation, the present case involves other-crimes evidence that was not introduced over the objection of the defense, but rather at its invitation. The defense sought to include such evidence in an effort to persuade the jury of the likelihood that some other member of the drug conspiracy killed Greg Rambo and the Bautistas. This circumstance undoubtedly diluted the probative value of the other-crimes evidence for the prosecution's case, because it was clear the defense desired that the jury consider this evidence for the purpose of establishing defendant's innocence of the charged offenses.

We weigh the foregoing impact against defendant's damning trail of incriminating statements and the circumstantial evidence linking him to the Bautista murders. Larry Tom Whittington, Patricia Shepard, Susan Rambo, and Wayne James each testified as to defendant's confessions. The prosecution presented testimony (of Larry Tom Whittington) that placed defendant at the crime scene on the night of the killings, that established defendant had been arguing with Maureen Bautista, and that defendant had feared she would "snitch him off"; the victims were killed in brutal fashion according to the witnesses who related defendant's confessions – testimony corroborated by the prosecution's forensic testimony, and defendant subsequently went to extreme lengths to conceal the murders, including the removal of his personal effects (and photographs depicting him) from the Bautistas' residence, transportation of the bodies from Bakersfield to Shandon, and burial of the Bautistas' bodies beneath a layer of freshly poured cement. Six days after law enforcement officials exhumed the bodies, defendant falsely identified himself to the officer who arrested him. Viewed against such overwhelming evidence establishing defendant's guilt of the charged offenses, the challenged section of special instruction No. 3, allowing the jury to consider the other-crimes evidence to establish defendant's character, led to a cumulative rather than an unduly prejudicial use of the evidence. We therefore conclude that the trial court's error was harmless beyond a reasonable doubt. (Chapman v. California, supra, 386 U.S. at p. 24.)

2. Accomplice liability

Defendant contends the trial court committed reversible error when it instructed the jury pursuant to 20 standard jury instructions relating to the subjects of accomplice testimony and conspiracy. Defendant's contention rests upon three distinct arguments: (1) the trial court's instructions represented a "chaotic array" that confused the jury; (2) the trial court misread two instructions; and (3) the trial court erred in rejecting defense counsel's request for a special instruction pertaining to the testimony of an informer.

a. The standard instructions were not confusing

The trial court instructed the jury pursuant to CALJIC Nos. 2.27, 3.10, 3.11, 3.12, 3.13, 3.14, 3.18, and 3.19, which addressed the matter of accomplices, and CALJIC Nos. 6.10.5, 6.11, 6.12, 6.13, 6.14, 6.16, 6.17, 6.18, 6.19, 6.20, 6.21, and 6.22, which addressed the subject of conspiracy. Pursuant to CALJIC No. 17.31, the jurors were instructed that not all instructions necessarily were applicable.

Defendant's argument that the foregoing instructions confused the jury is based upon several contentions, none of which have merit. First, defendant contends the conspiracy instructions were deficient because he was not charged with conspiracy, the instructions thus leaving the jury confused as to what conspiracy could be found. This contention ignores both the evidence at trial suggesting the presence of a drug conspiracy, and the defense theory that the killings were a foreseeable result of that conspiracy. Second, defendant contends the trial court failed to tailor the conspiracy instructions to "conform" to the case, instead allowing the jury to "roam without guidance." Yet this argument ignores both the comprehensive nature of the conspiracy instructions given and the particular instruction to the jury that it should disregard any instruction that applied to facts that the jury determined did not exist. Third, defendant contends the trial court confused the jury by giving instructions on aiding and abetting. Such instructions clearly were proper, however, in view of the evidence that other individuals participated in concealing the murders, thereby raising the possibility that one or more persons might have assisted the killer in perpetrating

these crimes.

Defendant also contends the trial court confused the jury by instructing them pursuant to CALJIC No. 6.20 (withdrawal from conspiracy), even though there was no evidence that any conspirator had withdrawn from the conspiracy. This argument must fail because the presence of a conspiracy was a jury question necessarily embracing issues of who participated in the Shandon drug operation, and when that participation occurred. Moreover, because defendant moved his drug operation from Shandon to Parkfield in December of 1984, a factual issue existed as to whether the Shandon drug conspiracy existed after that move.

Defendant contends the trial court confused the jury in refusing to modify CALJIC No. 6.22, which instructed the jury, in pertinent part, that "Each person in this case is individually entitled to, and must receive, your determination whether he was a member of the alleged conspiracy." Defendant sought to substitute the names of the five key prosecution witnesses for the words "[e]ach person." Defendant's requested substitution obviously would have unduly limited the jury's consideration of who might have participated in the drug conspiracy.

The giving of the accomplice and conspiracy instructions was justified on the basis of the defense's theory that the deaths of Maureen and Telesforo Bautista were the foreseeable result of a conspiracy involving prosecution witnesses. Whether any witness was a member of a conspiracy, whether the murders were a foreseeable consequence of a conspiracy, and whether any witness required corroboration because he or she was an accomplice to the killings were factual matters properly left for the jury's determination. Viewed singularly or collectively, the standard instructions given by the trial court were not confusing. Moreover, any theoretical possibility of confusion was diminished by the parties' closing arguments: defense counsel argued that corroboration was required because the key prosecution witnesses were conspirators, and the prosecution emphasized that the People had shown corroboration if it was needed. There is no indication in the record that the jury sought clarification of the instructions challenged on appeal. We therefore reject defendant's argument that the trial court's instructions confused the jury.

b. The trial court's misreading of CALJIC Nos. 3.19 and 6.10.6 constituted harmless error

In instructing the jury pursuant to CALJIC No. 3.19 (burden to prove corroborating witness is an accomplice), the trial court failed to read the full instruction, the fourth paragraph of which provided: "In the event that the defendant has not proved by a preponderance of the evidence that any witness is an accomplice or the evidence is evenly balanced so that you are unable to say that the evidence on either side of the issue outweighs the other, then you must find that such witness was not an accomplice" The court inadvertently omitted reading the italicized portion of the instruction.

Defendant contends the trial court's error in rendering an incomplete version of CALJIC No. 3.19 violated his right to due process of law. We disagree. The error was harmless, because the jury received the correct version of CALJIC No. 3.19 in its written form. (See People v. Andrews (1989) 49 Cal.3d 200, 216; see also People v. Heishman (1988) 45 Cal.3d 147, 163-165 [trial court's omission of the word "not" from the same sentence in CALJIC No. 3.19 held to be harmless].)[19] Moreover, the trial court's misreading could not have been prejudicial in light of the other instructions given. (See People v. Ghent, supra, 43 Cal.3d at p. 763.)

CALJIC No. 6.10.5 defines conspiracy and explains that, in order to find that a defendant was a member of a conspiracy, there must be proof of an unlawful agreement, specific intent to commit a public offense, and proof of the commission of at least one overt act for the purpose of accomplishing the object of the agreement. Prior to the giving of the instructions, the court agreed to tailor the language in this instruction by replacing the reference to "defendant" wit the word "persons." In instructing the jury pursuant to CALJIC No. 6.10.5, however, the trial court stated, in pertinent part, that "In order to find a person to be a member of a conspiracy, in addition to proof of the unlawful agreement and specific intent, there must be proof of the

---

19. The current version of CALJIC No. 3.19 omits the sentence here at issue. (CALJIC (5th ed. No. 3.19.)

commission of at least one overt act." Thus, as given by the trial court, the instruction failed to reflect precisely the modification discussed with counsel.

Defendant's contention that the trial court's error violated his right to due process of law is without merit. This technical error did not render the instruction inconsistent with the defense theory of the case, nor did it impermissibly restrict the jury in determining whether any person was a conspirator. (See People v. Lyons (1958) 50 Cal.2d 245, 271.) No prejudice appears.

c. Special instruction A: testimony of an informant

Defendant contends that the trial court erred in refusing to instruct the jury pursuant to special instruction A, which would have cautioned the jury to examine with greater care the testimony of an informer.[20] This instruction was patterned upon the federal rule that requires the giving of a cautionary instruction regarding the testimony of an informant when that testimony furnishes the only strong evidence of guilt. (United States v. Patterson (9th Cir. 1981) 648 F.2d 625, 630-631.) Defendant contends the giving of this instruction was required because the prosecution's case relied upon the testimony of five witnesses who stated that defendant had confessed to the murders.

The federal rule supporting defendant's proposed instruction differs from the law applied in California's state courts.

20. Special instruction A provided:

"The testimony of an informer who provides evidence against a defendant for pay, or for immunity from punishment, or for personal advantage or vindication, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the informer's testimony has been affected by interest, or by prejudice against defendant." (Citing Devitt & Blackmar, Federal Jury Practice and Instructions (3d ed. 1977) § 17.02.)

(Evid. Code, § 411;[21] People v. Alacla, supra, 36 Cal.3d at p. 623.) This court previously has upheld the refusal to give a similar, cautionary instruction regarding the trustworthiness of an immunized witness's testimony. (People v. Hunter (1989) 49 Cal.3d 957, 977-978; see also People v. Payton (1992) 3 Cal.4th 1050, 1059 [rejecting claim that trial court erred in failing to instruct on its own motion that testimony of a jailhouse informant "should be viewed with suspicion and distrust"]; People v. Castro (1979) 99 Cal.App.3d 191, 196-197 [appellate court rejected instruction identical to that proposed here].) The jury in the present case received adequate standard instructions on the credibility of witnesses. (CALJIC Nos. 2.20, 2.21, 2.22, 2.23.) The trial court therefore did not err in refusing to give the special instruction requested by the defense.

3. The trial court's refusal to instruct the jury pursuant to the defense's special instructions pertaining to reasonable doubt and the need to view with caution the testimony relating to defendant's confessions

Defendant contends the trial court committed reversible error in rejecting special instructions, submitted by the defense, pertaining to the reasonable doubt standard of proof and the need to view with caution the testimony relating to defendant's confessions. As we shall explain, we reject defendant's argument.

21. Evidence Code section 411 provides:

"Except where additional evidence is required by statute the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact."

Enacted subsequent to the present trial, and therefore inapplicable here, section 1127a, subdivision (b), prescribes that, upon the request of a party, the trial court shall instruct that "'The testimony of an in-custody informant should be viewed with caution and close scrutiny. . . .'"

a. Special instruction D: reasonable doubt

Defense counsel proffered special instruction D (set forth in the margin), directing the jury to consider specific evidentiary issues in determining the existence of reasonable doubt as to the identity of the Bautistas' killer.[22] The prosecutor objected on the ground that the

---

22. Defendant's special instruction D provided:

"In determining whether reasonable doubt exists as to whether someone other than Mr. Garceau killed Maureen and Telesforo Bautista, you may consider any of the following evidence:

"In whose apartment were they killed?

"Who moved the bodies?

"Who cleaned up the apartment and removed the bodies?

"At whose property were they buried?

"Who had a motive to kill them?

"Who benefitted from their death?

"Who lied to the police about their deaths?

"Who withheld information from the police about their deaths?

(Footnote continued on next page.)

(Footnote continued from previous page.)

"Who arranged for digging the hole in which they were buried?

"Who purchased the cement to cover the bodies?

"Who knew where Maureen's car was hidden?

"Who received immunity to testify?

"Who was seen by neighbors carrying the bodies?

"Who lied under oath in court?

"What is the relationship between all those people who say Mr. Garceau confessed to them?

"Who filed false reports in Greg Rambo's death?

"Who called Greg Rambo's phone asking for him, although knowing he was dead?

instruction was argumentative. Following argument by counsel, the trial court refused the requested instruction, observing that it would confuse the jury and, "for the most part, it is argumentative."

The trial court's ruling was correct. In People v. Wright (1988) 45 Cal.3d 1126, 1135-1138, we rejected a special instruction that similarly pinpointed specific evidence rather than a particular theory of the defendant's case. (See also People v. Daniels, supra, 52 Cal.3d at pp. 870-871; People v. Lucero (1988) 44 Cal.3d 1006, 1020-1021; People v. Adrian (1982) 135 Cal.App.3d 335, 338.) Such an instruction properly is refused as argumentative because it "would invite the jury to draw inferences favorable to the defendant from specified items of evidence on a disputed question of fact, and therefore properly belongs not in instructions, but in the arguments of counsel to the jury." (People v. Wright, supra, 45 Cal.3d at p. 1135; People v. Farmer (1989) 47 Cal.3d 888, 914.) To the extent that special instruction D could be read to embrace stated principles of law involving reasonable doubt, it was repetitious of other instructions given, notable CALJIC No. 2.90, which this court has recognized as "the best available definition of the standard of proof beyond a reasonable doubt." (People v. Crandell (1988) 46 Cal.3d 833, 881; see also §§ 1096, 1096a.) The giving of special instruction D therefore would have confused the jury, and properly was refused on that ground as well. (People v. Farmer, supra, 47 Cal.3d at p. 913.)

"Who had Greg Rambo's wallet, knives and tapes immediately after his death?

"Who had guns last seen with Greg Rambo immediately after Greg Rambo's death?

"Who benefits from having Robert Garceau blamed for the killings of Maureen and Telesforo Bautista and Greg Rambo?

"Whose vehicle was used to move Greg Rambo's body?

"The length of the delay between alleged statements by Garceau and the reporting of those statements by the people who say he made them."

b. Special instruction F: viewing with caution the testimony related to defendant's confessions

Defense counsel proffered special instruction F (set forth in the margin), directing the jury to view with caution the testimony relating to defendant's confessions, and focusing upon specific evidentiary factors relevant to the prosecution witnesses who testified that defendant confessed to committing the Buatista murders.[23/] The

---

23. Defendants' special instruction F provided:

"Confession testimony to be viewed with caution.

"Confession testimony has been received in this trial for the purpose of identifying the defendant as the person who committed the crimes charged. The law recognizes that confession testimony is not always reliable, and that cases of false testimony about confessions have been known to occur. You should therefore view confession testimony with caution, and evaluate it carefully in light of the factors I shall discuss.

"Factors to consider in determining credibility of confession testimony[:]

"Many factors can affect the accuracy of confession testimony. In determining the weight to be give the confession testimony in this case, you should first consider the factors I have previously mentioned that may affect confession testimony. (Some are known to you from your personal experiences, while others have been the subject of scientific study and proof.)* Among the more important factors to consider are the following.

"How long did the witness take to report the alleged confession? Did a witness give a report of the confession immediately after the confession was allegedly made?

"Did the witness have a motive to place the blame on the person allegedly confessing?

"Was the witness connected to the crimes by incriminating evidence?

"Was the defendant connected to the crimes by any

prosecutor objected on multiple grounds, among them that the instruction was duplicative and argumentative. The trial court declined to instruct the jury pursuant to special instruction F, ruling that the instruction was objectionable on the latter two grounds. The trial court's ruling was correct. Special instruction F improperly selected certain evidence and implied the weight to be derived therefrom, thus creating the same type of argumentative instruction disapproved in People Wright, supra, 45 Cal.3d at pages 1135-1138. The instruction also was repetitious of the standard cautionary instructions given to the jury in this case (CALJIC Nos. 2.70 and 7.71.7)[24/] and therefore properly was

---

evidence other than the alleged confession?

"Was the witness granted immunity, or given any other promise or inducement to testify?

"Did the witness stand to gain financially by placing the blame on the defendant?

[Citation.]"

*In his argument to the trial court, defense counsel offered to eliminate that portion of the proffered instruction enclosed in parentheses.

24. CALJIC No. 2.70, as rendered by the trial court, provided:

"A confession is a statement made by a defendant other than at his trial in which he has acknowledged his guilt of the crimes for which he is on trial. In order to constitute a confession, such a statement must acknowledge participation in the crimes as well as the required criminal intent.

"A statement made by a defendant other than at his trial is not a confession, but an admission, whenever the statement does not, by itself, acknowledge his guilt of the crime for which he is on trial, but which tends to prove his guilt when considered with the rest of the evidence.

"You are the exclusive judges as to whether the defendant has made a confession or an admission and if so whether such statement is true in whole or in part. If you should

refused. (See also People v. Farmer, supra, 47 CAL.3d at p. 913.)

4. The trial court's refusal to instruct the jury pursuant to special instruction H regarding the "Nash testimony," and its decision instead to instruct pursuant to the prosecution's special instruction No. 1

In denying defendant's motion to strike the "Nash testimony," the trial court indicated it would "consider a limiting instruction to the jury. . . ." Both parties thereafter submitted their proposed special instructions pertaining to the admissibility of the "Nash testimony."

Defense counsel proffered special instruction H (set forth in the margin), directing the jury to view the "Nash testimony" only as it might relate to motive.[25] IN response, the prosecutor argued the

---

find that a defendant did not make the statement, you must reject it. If you find it true in whole or in part, you may consider that part which you find to be true.

"Evidence of an oral confession or oral admission of the defendant should be viewed with caution."

CALJIC No. 2.71.7, as rendered by the trial court, provided:

"Evidence has been received from which you may find that an oral statement of intent, plan, motive, or design was made by the defendant before the offense with which he is charged was committed.

"It is your duty to decide whether such statement was made by the defendant.

"Evidence of an oral statement ought to be viewed with caution."

25. Defendant's special instruction H provided:

"The testimony regarding Eddie Nash, if believed, is only to be considered by you insofar as it relates to a possible

superiority of its special instruction No. 1 (set forth in the margin), which paralleled a modified version of CALJIC No. 2.50 upheld in People v. Contreras (1983) 144 Cal.App.3d 749, 755-758 [evidence of gang membership].[26] The trial court indicated that special instruction No. 1 would be given, and that special instruction H was refused "as being adequately covered in [s]pecial [i]nstruction No. 1."

Defendant contends the trial court committed reversible error in refusing to instruct pursuant to special instruction H and in giving instead special instruction No. 1. Defendant argues that special

---

motive. It is improper to find a person guilty of any offense based on guilt by association."

26. The prosecution's special instruction No. 1 provided:

"Evidence has been received concerning the character and reputation of another witness, Ed Nash, and of defendant's association with that witness. Such evidence, if believed, was not received and may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to commit crimes. Such evidence was received and may be considered by you only for the limited purposes of determining if it tends to show:

"The identity and motive of the person who committed the crimes, if any, of which the defendant is accused;

"The defendant's state of mind at the time of the crimes charged;

"Corroboration of any other evidence;

"Credibility of any other witness.

(Footnote continued on next page.)

(Footnote continued from previous page.)

"For the limited purposes for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case.

"You are not permitted to consider such evidence for any other purposes."

instruction H properly countered the prosecution's attempt to establish defendant's guilt through his association with Nash. Defendant further argues that special instruction No. 1 failed effectively to limit the jury's consideration of the "Nash testimony."

We reject defendant's arguments. Defendant's special instruction H was unduly limiting because, a discussed earlier, the "Nash testimony" was relevant not only to the matter of motive, but to the killer's identity and state of mind, and also provided corroboration of other testimony that suggested defendant has been associated with Eddie Nash.

Special instruction No. 1 h=properly allowed the jury to consider the "Nash testimony" for any of the foregoing valid purposes. The instruction also protected defendant by explicitly precluding the jury from considering the "Nash testimony" "to prove that defendant is a person of bad character or that he has a disposition to commit crimes." Such protection was both broader and clearer than the amorphous charge – set fort in defendant's special instruction H – that "[i]t is improper to find a person guilty of any offense based on guilt by association." We discern no error.[27/]

5. Special instruction G: voluntary intoxication

Defendant contends that the trial court committed reversible error in refusing to instruct the jury pursuant to defendant's special instruction G (set forth in the margin), which would have directed the jury to consider the effect of intoxication upon defendant's mental state.[28/] The instruction was a modified version of CALJIC Nos.

---

27. In view of our holding that the trial court properly instructed the jury with regard to the limited admissibility of the "Nash testimony," we need not, and do not, reach defendant's alternate contention that the trial court's ruling was prejudicial to defendant at the penalty phase of his trial.

28. Defendant's special instruction G provided:

"If you find from the evidence that at the time the alleged crime was committed, the defendant was intoxicated,

4.21 and 8.77.

At trial, defendant argued that the instruction was warranted on two grounds. First, defendant argued that there was sufficient evidence of defendant's voluntary intoxication to require that the jury be instructed on this subject. Second, even if there was insufficient direct evidence to warrant the giving of this instruction, other evidence establishing defendant's habitual cocaine usage supported an inference that, because defendant freebased cocaine during the morning shortly after the Bautistas were killed, he would have been freebasing cocaine during the evening (or early morning) when these crimes were committed. In response, the prosecution argued that the evidence was insufficient to justify the giving of defendant's proffered special instruction, and that the instruction was inconsistent with the third-party-culpability defense presented by the defendant.

After considering the parties' arguments, the trial court rejected special instruction G on the basis that "there is not sufficient evidence regarding voluntary intoxication at the time of the alleged homicide. For the jury to be instructed on that aspect, it would be

---

you must consider what effect, if any, it had on the defendant's forming any of the specific mental states that are essential elements of murder.

"Thus, if as a result of that intoxication you have a reasonable doubt whether he did, maturely and meaningfully, premeditate, deliberate, and reflect upon the gravity of his contemplated act, you cannot find him guilty of a willful, deliberate and premeditated murder of the first degree.

"Also, if as a result of that intoxication you have a reasonable doubt whether he formed the mental states constituting either express or implied malice aforethought and the intent to kill, you cnnnot find him guilty of murder of either the first or second degree.

"If from all the evidence you have a reasonable doubt whether defendant formed such specific intent and mental state, you must give the defendant the benefit of that doubt and find that he did not have such specific intent and mental state."

inviting the jury to speculate and the Court deems that to be inappropriate." The trial court further ruled that defense counsel would not be permitted to argue to the jury that defendant's voluntary intoxication at the time of the killings could negate the mental state required to establish first degree murder. The trial court, indicating it would allow argument as to whether defendant's cocaine usage had a bearing upon whether defendant did in fact act with premeditation and deliberation, stated that defense counsel could argue "the cumulative effect of using cocaine over a period of time[,] should the jury consider whether that had any bearing on [defendant's] conduct."

On appeal, defendant challenges the trial court's finding that there was insufficient evidence to warrant the giving of special instruction G. Defendant cites the testimony of witnesses who describe his prodigious use of cocaine. He also links the testimony of Harlyn Codd, who stated that defendant would become paranoid when engaged in freebasing cocaine, with the testimony of Larry Tom Whittington, who stated that defendant appeared to be exhibiting signs of paranoia when Whittington visited defendant at Patricia Shepard's apartment on the night of the killings. Defendant also links Susan Rambo's testimony that defendant was "hyper" when he freebased cocaine, with her testimony that defendant was "very nervous, hyper, very excited" when he sped into her backyard in September of 1984 and confessed the killings to her. According to defendant, the collective testimony of Codd, Whittington, and Susan Rambo establishes an inference that defendant must have been using cocaine at or shortly before the time of the killings.

We disagree with defendant's characterization of the evidence. There was no evidence introduced at trial that defendant had ingested cocaine at or shortly before the time of the killings. Moreover, Susan Rambo and Larry Tom Whittington each testified that defendant often wen several days without consuming cocaine, thereby refuting defendant's argument that his cocaine usage had been so habitual as to warrant an inference he had ingested cocaine at a time relevant to the Bautista killings.

On this record, the trial court was not obligated to instruct the jury in the manner requested by defendant. (See People v. Ramirez (1990) 50 Cal.3d 1158, 1178-1181; see also People v. Saille (1991) 54

Cal.3D 1103, 1115-1117.) Evidence that a defendant has ingested a drug at some point in time does not equate to usage at the time of the killings. (People v. Williams (1988) 44 Cal.3d 1127, 1143.) Nor does such evidence suggest that defendant suffered impairment related to previous ingestion of cocaine. The paranoia exhibited by defendant concerning "snitches," at the time Larry Tom Whittington visited him at Patricia Shepard's apartment, did not establish that defendant then was ingesting cocaine; the record suggests that defendant was obsessed with "snitches," without regard to whether he was suffering the effects of cocaine intoxication. That defendant may have been "hyper" on the morning he sped into the Ramos' yard, and may have freebased cocaine after his arrival there, similarly does not establish that he had ingested cocaine shortly before the killings (which could have occurred several hours earlier.)

Thus, the trial court's ruling was correct. Evidence of defendant's alleged voluntary intoxication was "'too insubstantial to require submission of the defense to the jury.'" (People v. Williams, supra, 44 Cal.3d at p. 1143 [citing the cases].)

6. Cumulative error

Defendant contends that the cumulative effect of the alleged errors committed by the trial court during the guilt phase requires reversal of his conviction. Having reviewed these alleged errors, we conclude that they were few and generally trivial, and that the only error of significance was the trial court's instruction of the jury pursuant to special instruction No. 3, which, as we have discussed, improperly allowed the jury to consider evidence of defendant's other crimes for the purpose of ascertaining defendant's character. Even when viewed cumulatively, the errors committed fall far below the showing required to warrant reversal based upon cumulative error. Defendant's contention as to cumulative error therefore is without merit.

III. PENALTY PHASE ISSUES

A. Unadjudicated criminal activity

At the penalty phase, the prosecution introduce evidence in aggravation pertaining to defendant's 1982 arrest for the kidnapping of Diane Sems (§ 207) and possession of an explosive device (§ 12303.2), as well as evidence pertaining to his 1981 arrest for possession of a machinegun (§ 12220, subd. (a)) and for being an ex-felon in possession of concealable firearms (former § 12021, subd. (a)). (§ 190.3.)

Defendant contends that the judgment of death must be reversed because the trial court permitted the prosecution to introduce evidence in aggravation pertaining to defendant's unadjudicated criminal activity.[29] His challenge rests upon four distinct arguments, none of which has merit.

First, defendant challenges the admission of evidence involving dismissed charges stemming from his 1982 arrest for kidnapping and possession of an explosive device, and from his 1981 arrest for possession of an explosive device, and from his 1981 arrest for possession of a machinegun and for being an ex-felon in possession of concealable firearms. Defendant argues that the introduction of such evidence violated his state and federal constitutional guaranties to a reliable sentence and to due process of law. He acknowledges that this court previously has rejected similar arguments in People v. Balderas (1985) 41 Cal.3d 144, 204-205, but requests that we reconsider our holding in that case. We decline to do so, observing that we repeatedly have rejected similar constitutional challenges to the admission of unadjudicated crimes. (See, e.g., People v. Pinholster (1992) 1 Cal.4th 856, 973; People v. Jackson (1989) 49 Cal.3d 1170, 1208.)[30]

---

29. At the penalty phase, the prosecution also introduced evidence of prior criminal acts by defendant that resulted in conviction: a 1981 conviction for possession of a silencer (§ 12520) and a 1972 conviction for burglary (§ 459). Defendant does not challenge the admission of this evidence.

30. Defendant does not challenge explicitly the admission of his unadjudicated criminal activity on the basis that section 190.3, factor (b), is void for "vagueness." (See Stringer v. Black (1992) 503 U.S. ___ [112 S.Ct. 1130]; see also Bacigalupo v. California (1992) 506 U.S. ___ [113 S.Ct. 32].) To the extent that defendant's challenge can be so interpreted, we reject his claim. (See People v. Tuilaepa (1992) 4 Cal.4th 569, 594-595.)

Second, defendant contends that he should be "deemed acquitted" of his 1981 offenses involving possession of a machinegun and of possession of an illegal weapon by an ex-felon. This contention is not supported by the record. Defendant pleaded guilty to possession of a silencer; the other charges were dismissed without a judicial determination as to their truth or falsity. A bargained conviction or dismissal does not constitute an acquittal under section 190.3. (People v. Heishman, supra, 45 Cal.3d at p. 193; People v. Melton (1988) 44 Cal.3d 713, 755.)

Third, we reject defendant's contention that the unadjudicated criminal activity that occurred in 1981 and 1982 was impermissibly "stale" at the time of defendant's trial in 1987. (See People v. Balderas, supra,41 Cal.3d at p. 202 [§ 190.3, factor (b), imposes no time limitation on introduction of defendant's prior violent criminality]; see also People v. Douglas (1990) 50 Cal.3d 468, 529-530 [evidence of prior violent activity not stale even though it occurred more than seven years earlier]; People v. Heishman, supra, 45 Cal.3d at p. 192 [introduction of evidence under § 190.3, factor (b), is not subject to exclusion on the ground that prosecution for the acts would be barred by the applicable statute of limitations]; People v. Jennings (1991) 53 Cal.3d 334, 388 [same].)

Fourth, we reject defendant's contention that introduction of evidence pertaining to his 1981 crimes was barred by the constitutional guarantee against being placed twice in jeopardy. This guarantee is inapplicable where evidence of prior criminal activity is introduced in a subsequent trial as an aggravating factor for consideration by a penalty phase jury. People v. Melton, supra, 44 Cal.3d at pp. 754-755; see also People v. Taylor (1990) 52 Cal.3d 719, 742-743; People v. Frank (1990) 51 CAL.3d 718, 728-729; People v. Douglas, supra, 50 Cal.3d at pp. 528-529.) We decline defendant's

request to reconsider the applicability of our recent decisions in Melton, and its progeny, to the sentencing phase of a capital case.

B. Other criminal activity and victim-impact evidence

Defendant contends that the judgment of death must be reversed because the trial court, over defendant's objection, admitted the testimony of Diane Sems, who, as described above, related to the penalty phase jury that in 1982 she had been forced into a pickup truck by an acquaintance named Terry Fabricant, blindfolded, and driven by another man to a house she did not recognize. After a few hours, she escaped and contacted the police. The following day, she identified the driver in a photo lineup. At trial, she recalled making a photo identification and, when asked on direct examination whether defendant appeared to be the same man who had driven the pickup truck, she replied, "I think so." On cross-examination, however, she acknowledged she was unsure who had driven the truck. Her identification of defendant (on direct examination) subsequently was corroborated by Phillip Quartararol, the police detective employed by the City of Los Angeles who had shown her the photo lineup, and who testified at trial that Sems had selected defendant's photograph.

Relying upon People v. Phillips (1985) 41 Cal.3d 29, defendant argues that insufficient evidence supported the trial court' ruling admitting Sems's testimony. Defendant also argues that Sems's testimony was irrelevant and inflammatory. (See Booth v. Maryland (1987) 482 U.S. 496; see also South Carolina v. Gathers (1989) 490 U.S. 805.) We reject each of these contentions.

1. The trial court's ruling was supported by substantial evidence

Prior to the admission of Diane Sims's testimony, at defendant's request the trial court conducted a preliminary inquiry outside the presence of the jury to ascertain whether there was substantial evidence to establish that defendant had kidnapped Sems. (See People v. Phillips, supra, 41 Cal.3d 29, 72-73, fn. 25.) Defendant argued that Sems's inability at trial to identify defendant positively as the driver of the pickup truck, and the prosecution's reliance on a prior, out-of-court photo identification, rendered her testimony legally insufficient,

because the evidence did not establish, beyond a reasonable doubt, defendant's involvement in the alleged kidnapping. The trial court overruled defendant's objection and, on appeal, defendant reiterates his challenge.

Notwithstanding Diane Sems's uncertain identification of defendant at trial, her prior photo identification of defendant, made one day after the alleged kidnapping, constituted sufficient evidence to support the trial court's ruling that the prior incident properly could be considered by the jury. (See People v. Lucky (1988) 45 Cal.3d 259, 287-290.) The trial court correctly ruled that Sems's photo identification of defendant was admissible under the prior identification exception to the hearsay rule, codified in Evidence Code section 1238.[31] Contrary to decedent's assertion, the admissibility of evidence pertaining to the alleged kidnapping did not turn upon whether the prosecution could establish beyond a reasonable doubt that defendant was the driver of the pickup truck. (People v. Hendricks (1988) 44 Cal.3d 635, 648.) Rather, the question whether defendant's other criminal activity (including the Sems incident) was proved beyond a reasonable doubt presented a question of fact for the jury. (Evid. Code, § 312; People v. Phillips, supra, 41 Cal.3d at p.72, fn. 25.) At the conclusion of the penalty phase, the trial court correctly instructed the jury that, before it could consider defendant's other criminal activity, the jury had to be satisfied beyond a

---

31. Evidence Code section 1238 provides:

"Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him wile testifying and:

"(a) The statement is an identification of a party or another as a person who participated in a crime or other occurrence;

"(b) The statement was made at a time when the crime or other occurrence was fresh in the witness'[s] memory; and

"(c) The evidence of the statement is offered after the witness testifies that he made the identification and that it was a true reflection of his opinion at the time."

reasonable doubt that the defendant did, in fact, commit such activity. The trial court's ruling as to Sems's testimony was correct, and the evidence properly admitted.

2. Sems's testimony constituted admissible victim-impact evidence

Defendant's challenge to the trial court's admission of Diane Sems's testimony on the ground that her testimony constituted impermissible victim-impact evidence is misplaced. We previously have rejected the argument that Booth v. Maryland, supra, and South Carolina v. Gathers, supra, bar the introduction of evidence relating to "the nature and circumstances of other criminal activity involving the use or threat of force or violence or the effect of such criminal activity on the victims . . . ." (People v. Benson (1990) 52 CAL.3d 754, 797; see also People v. Edwards (1991) 54 Cal.3d 787, 832-837.) The prosecution was entitled to present testimonial evidence of defendant's violent "criminal activity." (§ 190.3, factor (b); People v. Belmontes (1988) 45 Cal.3d 744, 808-809.) Moreover, the proscription against the use of victim-impact evidence at the sentencing stage largely has been overruled. (Payne v. Tennessee (1991) 501 U.S. ____ [111 S.Ct. 2597, 2608-2611]; see also People v. Thomas, supra, 2 Cal.4th 489, 535.) We therefore conclude that the trial court did not err in admitting Sems's testimony.

C. Weapons evidence

As part of her testimony pertaining to the kidnapping, Diane Sems stated she observed various weapons at the residence where she had been held captive. In corroboration, the prosecution introduced the testimony of Philip Quartararol, the City of Los Angeles police detective, who participated in a police search of the residence shortly after Sems escaped and reported the kidnapping. Quartararol testified that, during his search of the residence, he found two semiautomatic weapons, two shotguns, and "several thousand rounds of ammunition." On cross-examination, Quartararol acknowledged that, under the law in effect at the time he conducted the search in 1982, it was not illegal for

an ex-felon to possess the weapons discovered during the search.[32/]

The prosecution also presented the testimony of Douglas Gerst, a City of Los Angeles police officer, who participated in two police searches of defendant's residence in 1981. Gerst testified that, during these searches, he seized a Mac Ten machinegun (together with a silencer and ammunition he found nearby), six resolvers, two automatic pistols, six rifles, and twelve shotguns. Gerst also testified that "there were thousands of rounds of ammunition throughout the residence." He found mail and utility receipts addressed to defendant at the residence.[33/]

On appeal, defendant contends that the judgment of death must be reversed because the trial court admitted the foregoing evidence involving weapons. Defendant argues that this evidence should not have been admitted, because: (1) the trial court had rejected defendant's request to conduct a hearing pursuant to People v. Phillips, supra, 41 Cal.3d 29, 72-73, fn. 25, to ascertain whether defendant's possession of the weapons constituted a crime; (2) the evidence did not constitute a proper aggravating factor under section 190.3; and (3) introduction of this evidence was highly prejudicial. We reject each of these contentions

---

32. The trial court instructed the jury pursuant to special instruction No. 13, which provided, in pertinent part, that the testimony of Quartararol regarding the seizure of weapons and ammunition "may be considered only for the limited purpose of corroborating the testimony of Diane Sems. [¶] You shall not consider, take into account or be guided by that testimony for any other purpose."

33. The trial court instructed the jury pursuant to special instruction No. 11, which provided, in pertinent part, that the jury was to consider Gerst's testimony "only for the limited purpose of determining beyond a reasonable doubt whether the defendant possessed a machine gun, a silencer and handguns with a barrel length of twelve inches or less. You shall not consider, take into account or be guided by that testimony for any other purpose. . . ."

for the reasons set forth below.

1. Defendant failed to preserve the issue

The record does not support defendant's contention that the trial court denied his request for a hearing under Phillips, supra, 41 Cal.3d 29. Rather, defendant requested such a hearing only on the kidnapping issue, discussed, ante, and on the charge that at the time of his 1982 arrest in connection with the Sems incident, he was found to have been in possession of an explosive device. (§ 12303.2.) Defendant's challenge to the weapons evidence was based upon its alleged staleness and the prior dismissal of the weapons charges. Defendant did not request a hearing on the question whether the weapons discovered by law enforcement officers during their searches of his residence constituted criminal activity. Thus, defendant has failed to preserve this issue for review. (Evid. Code, § 353, subd. (a); People v. Mickle (1991) 54 Cal.3d 140, 186; People v. Green (1980) 27 Cal.3d 1, 27-34.)

2. The weapons evidence properly was admitted

Even if defendant had preserved the foregoing issue, our rejection of defendant's argument on the merits would be warranted for two distinct reasons. First, we have held that a hearing under Phillips, supra, 41 Cal.3d 29 may be unnecessary where, as was the case here, substantial evidence establishes each element of the alleged prior offense. (People v. Jennings, supra, 53 Cal.3d 334, 388-389.) Second, the police searches in this case uncovered a machinegun, a silencer beside it, and concealable handguns; defendant's possession of these firearms was illegal. (§ 12021, subd. (a) [possession of a firearm by an ex-felon]; § 12220, subd. (a) [possession of a machinegun].) His possession of such an arsenal clearly involved "the implied threat to use force or violence." (§ 190.3, factor (b); see generally, People v. Ramirez, supra 50 Cal.3d at pp. 1186-1187 [possession of concealed knife at California Youth Authority facility]; People v. Grant (1988) 45 Cal.3d 829, 849-851 [inmate's possession of prison-made shank].) Defendant's possession of a silencer found next to the machinegun strengthens this

conclusion and itself constitutes a felony. (§ 12520.)[34]

3. No prejudice appears

Contrary to defendant's assertion, the introduction of the weapons testimony was not unduly prejudicial. During the guilt phase, the jury had heard that defendant possessed firearms. Susan Rambo had testified that defendant always was armed with a gun. At the penalty phase, the jury properly was advised of defendant's felony conviction for possession of a silencer. Having heard these facts, and already having found defendant guilty of killing Maureen and Telesforo Bautista, the jury was unlikely to have been swayed by the penalty phase testimony of Diane Sems, Douglas Gerst, and Philip Quartararol linking defendant to the possession of various firearms. Any possibility that the jury might have been unduly influenced by this evidence was precluded by the trial court's limiting instructions.

D. Alleged prosecutorial misconduct

Defendant contends that the prosecutor improperly argued several issues to the jury. As explained below, ~~we find this~~ contention to be without merit.

1. Future dangerousness

In his opening statement to the jury at the penalty phase, defense counsel stated that defendant's prison history indicated that

---

34. The trial court opined that it may have committed a "de minimis" error in admitting the testimony regarding defendant's lawful possession of rifles and shotguns. With respect to the rifles and shotguns found during the searches conducted in 1981, we agree. But with regard to the search conducted in 1982, testimony regarding defendant's lawful possession of firearms was admissible as a circumstance of the kidnapping. (§ 190.3, factor (b).)

defendant was "what you might call a model prisoner." Counsel also introduced into evidence a document summarizing defendant's successful adjustment to prison life. In response, the prosecutor suggested in closing argument that defendant presented a future danger.

On appeal, defendant contends that the prosecutor's argument pertaining to defendant's future dangerousness was unsupported by the evidence, and therefore violative of defendant's constitutional rights to due process of law and to be free from cruel and unusual punishment. Defendant also contends that the prosecutor's argument mirrored an argument that we held impermissibly urged the jury to view the absence of mitigating evidence as a factor in aggravation. (See People v. Davenport (1985) 41 Cal.3d 247, 288-290.)

We reject these contentions. Defendant's failure to interpose an objection during the prosecutor's argument constituted a waiver of his present claims of error. (People v. Duncan (1991) 53 Cal.3d 955, 976-977; People v. Green, supra, 27 Cal.3d at pp. 27-34.) Even if defendant properly had preserved the issue, his arguments would fail. The prosecutor's argument did not invite the jury to speculate concerning defendant's future dangerousness as a factor in aggravation. (See People v. Malone (1988) 47 Cal.3d 1, 31 [and cases cited therein].) Rather, the argument permissibly was aimed at persuading the jury not to accord significant weight to the defense evidence, proffered in mitigation, that defendant had been (and, presumably, would continue to be) a model prisoner. (See People v. Douglas, supra, 50 Cal.3d at pp. 535-536.) Nor did the prosecutor convert mitigating evidence into aggravating evidence. His statement that there was no evidence suggesting defendant could be rehabilitated, and that defendant posed a threat of violence, constituted fair comments upon defendant's violent criminal past and therefore did not run afoul of Davenport's proscription against arguing the absence of mitigating factors as a factor in aggravation. (See also People v. Bell (1989) 49 Cal.3d 502, 548-550 [comment on future dangerousness is permissible if based upon evidence or inferences drawn from that evidence].) We conclude that the prosecutor's comments regarding defendant's future dangerousness constituted "the sort of vigorous argument a prosecutor is entitled to make." (People v. Thompson, supra, 45 Cal.3d at p. 125; see also People v. Davenport, supra, 41 Cal.3d at p. 288.)

2. Circumstances of the crime

In his closing argument, the prosecutor asked the jury to consider the circumstances of the Bautista killings, and to imagine those crimes from the victims' perspective. On appeal, defendant contends that the prosecutor's argument relied upon speculative inferences, was unsupported by the evidence, and injected constitutionally irrelevant considerations, such as the victims' personal characteristics. Defendant further contends that the prosecutor's remarks were designed to inflame and prejudice the jury by focusing the jury's attention upon Telesforo Bautistia's diminutive stature and emotional attachment to defendant. In defendant's view, the prosecutor's comments regarding Telesforo's physical and emotional vulnerability constituted improper "victim-impact" evidence under Booth v. Maryland, supra, 482 U.S. 496, and South Carolina v. Gathers, supra, 490 U.S. 805.

We reject defendant's contentions. His failure to object below bars appellate review of the issue. (People v. Duncan, supra, 53 Cal.3d at pp. 976-977; People v. Green, supra, 27 Cal.3d at pp. 27-34.) Even if defendant properly had preserved the issue, rejection of defendant's position would be warranted. The prosecutor's comments properly reminded the jury of the "circumstances of the crime." (§ 190.3, factor (a).) The references to Telesforo Bautista's vulnerability reminded the jury that the boy was not one who reasonably could have defended himself, or his mother, against an angry, knife-wielding assailant bent on silencing them both. Thus, Telesforo's slight build, his witnessing of his mother's slaying, and his emotional attachment to her (and to defendant) all served to remind the jury of the cruel and brutal manner of the killings. (See People v. Carrera (1989) 49 Cal.3d 291, 336-337 [likelihood that stabbing victims did not resist attack bore directly upon the manner of the murders and therefore was a circumstance of the crimes].) Nor was it improper for the prosecutor to ask the jury to imagine the crimes from the victims' perspective. (People v. Lewis (1990) 50 Cal.3d 262, 283-284.) The prosecution's request that the jury give consideration to the terror that the victims experienced did not call for speculation or violate Booth and Gathers, but rather was based upon reasonable inferences to be drawn from the evidence. (People v. Marshall (1990) 50 Cal.3d 907, 929; People v. Douglas,

supra, 50 Cal.3d at pp.536-537.) Finally, the prosecutor reminded the jury that he did not seek a verdict based upon passion, but instead urged "a rational verdict based on the law and the evidence."

3. Military service

In his closing argument, the prosecutor briefly referred to defendant's military service.[35/] On appeal, defendant contends that the prosecutor mentioned defendant's military service in Viet Nam in an impermissible manner, attempting to convert mitigating evidence into aggravating evidence. We disagree. Not only did defendant waive this issue by failing to object at trial, but his argument is deficient because it is unsupported by the record. The prosecutor did not argue that defendant's military service was an aggravating factor; rather, the prosecutor argued it was not mitigating. (See People v. Gordon (1990) 50 Cal.3d 1223, 1271-1273 [prosecutor's argument regarding defendant's military service did not convert mitigating evidence into aggravating evidence, but simply illustrated that defendant's actions after leaving the military demonstrated that he had the ability to choose between good and evil, and that he had selected evil].) Moreover, the jury specifically was instructed that it could consider defendant's military service as a mitigating factor.

4. Sympathy

In his closing argument, the prosecutor briefly referred to the

35. The prosecutor stated, in pertinent part:

"A lot of people went to Viet Nam. A lot of people went to Viet Nam; a lot of them didn't come back. Among those who did come back are quadriplegics, people horribly scarred for the rest of their lives, people who nonetheless want to be and have been and surely will continue to be contributing members of this society. They're not kid killers. What is there about his army service, then, that tells you that you should spare his life? His experiences, no doubt, aren't unique. . . ."

jury's opportunity to consider sympathy for the defendant.[36/] On appeal, defendant contends that the prosecutor's argument improperly suggested to the jury that it was precluded from considering, as a factor in mitigation, its sympathy for defendant. We disagree. Not only has defendant failed to preserve this issue, but his contention is unsupported by the record. The prosecutor informed the jury that it could consider sympathy, mercy, and sentiment for the defendant. That the prosecutor suggested defense counsel "no doubt must urge you" to consider sympathy does not imply that defense counsel was only "doing his duty," or that there was no legitimate basis for showing mercy or sympathy to defendant. Defendant's contention is hypertechnical and misconstrues the prosecutor's argument.

E. Miscellaneous contentions

Defendant submits four claims of constitutional error that in recent years have been rejected by this court. They are:

(1) that the 1978 death penalty statute is unconstitutional on its face and as applied, due to its lack of procedural safeguards (People v. Alcala (1992) 4 Cal.4th 747, 809-810, and cases cited therein);

(2) that the trial court erred in instructing the jury pursuant to a modified version of CALJIC No. 8.84.2 (1986 rev.) (the "Brown" instruction [cf. People v. Brown (1985) 40 Cal.3d 512, 538-544]), informing them that in order "[t]o return a judgment of death, each of you must be persuaded that the aggravating evidence or circumstances are so substantial in comparison with the mitigating circumstances that

36. The prosecutor stated, in pertinent part:

"These are brutal savage facts, very raw, but you found them and determined them to be true. Those factors in mitigation, those factors that the defense no doubt must urge you to consider in sparing his life, include the giving of any mercy or any sympathy or any kind of sentimentality to the defendant. The People's response to that is how much did he show to Telesforo? How much mercy did he show to that child?"

it warrants death instead of life without parole" (People v. Marshall, supra, 50 Cal.3d at pp. 933-935; People v. Lewis, supra, 50 Cal.3d at pp. 281-282);

(3) that the trial court erred in failing to instruct the jury pursuant to a special instruction (withdrawn by defense counsel) that would have informed them that a mitigating circumstance need not be proved beyond a reasonable doubt, but that the jury was required to find the existence of a mitigating circumstance if there was any substantial evidence to support it (People v. Bonillas (1989) 48 Cal.3d 757, 789-790);

(4) that the trial court erred in failing to instruct the jury pursuant to a special instruction (withdrawn by defense counsel) that would have informed them that other-crimes evidence could not be considered as evidence in aggravation unless the jury agreed unanimously that the other crime had been proved beyond a reasonable doubt (People v. Allison (1989) 48 Cal.3d 879, 899; see also People v. Thompson, supra, 50 Cal.3d at p. 185).

Defendant fails to persuade us that there is any reason for us to reconsider these recent rulings, and we therefore decline to do so.

F. Cumulative impact of error

Defendant contends that the cumulative impact of error at the guilt and penalty phases of his trial undermined the reliability of the sentencing process, mandating that his death sentence be set aside. We reject this contention. The few errors committed at defendant's trial fail to "raise a reasonable possibility that the jury might have reached a more favorable result had such error or errors not occurred." (People v. Lewis, supra, 50 Cal.3d at p. 285.)[37]

---

37. We also note that defendant filed a petition for writ of habeas corpus, contending that defense counsel rendered ineffective assistance of counsel throughout the proceedings, undermining the reliability of the jury's verdicts reached at the conclusion of the guilt and penalty phases of the trial. On September 1, 1993, we denied defendant's petition on the merits. (Mosk, J., was of the opinion that an order to show cause should issue.) (In re Garceau on Habeas Corpus, S022420.)

DISPOSITION

The judgment is affirmed in its entirety.

GEORGE, J.

WE CONCUR:
LUCAS, C.J.
PANELLI, J.
ARABIAN, J.
BAXTER, J.

COPY

PEOPLE v. GARCEAU

S004776 [Crim. 26410]

CONCURRING OPINION BY MOSK, J.

I concur in the judgment. After review, I have found no prejudicial error or other defect.

I also concur generally in Justice George's opinion for the court. In my view, it is substantially sound in reasoning and manifestly correct in result.

I write separately to address defendant's claim that the trial court erred when it instructed the jury that it might consider evidence that he committed crimes other than the charged murders "for any purpose, including but not limited to" "[h]is character or any trait of his character" and "[h]is conduct on a specific occasion . . . ."

I believe that the 'other crimes" instruction was erroneous under California law. It impermissibly allowed the jury to use the evidence in question to infer that defendant was possessed of a bad character or had a disposition or propensity to commit unlawful acts, and that he conducted himself accordingly with respect to the charged murders. It should not have done so. (See, e.g., People v. Hayes (1990) 52 Cal.3d 577, 625 [impliedly approving an instruction that "warned the jury not to consider the other-crimes evidence to prove that [the] defendant was a person of bad character of had a disposition to commit crimes" (italics in original)]; cf. Evid. Code, § 1101, subd. (a) [providing that, as a general matter, "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion"].) It goes without saying that a charge of this sort should never again be given.

I shall assume that the "other crimes" instruction was also erroneous under the United States Constitution. The due process clause of the Fourteenth Amendment "protects the accused against conviction

except upon proof [by the state] beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged" (In re Winship (1970) 397 U.S. 358, 364), including, of course, identity. If an instruction lightens the state's burden, it violates due process. (See, e.g., Sandstrom v. Montana (1979) 442 U.S. 510, 520-524.) It is argued that the instruction here effectively did so.

On the assumption that it offends the due process clause of the Fourteenth Amendment, the "other crimes" instruction would be subject to harmless-error analysis under Chapman v. California (1967) 386 U.S. 18. "The Chapman test is whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" (Yates v. Evatt (1991) ___ U.S. ___, ___ [111 S.Ct. 1884, 1892].) "To say that an error did not contributed to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question . . . ." (Id. at p. ___ [111 S.Ct. at p. 1893].)

Turning to the case at bar, I am conclude [sic] that the "other crimes" instruction was harmless beyond a reasonable doubt under Chapman.

To be sure, in the general case an instruction allowing the jury to use "other crimes" evidence to infer that the defendant is possessed of a bad character or has a disposition or propensity to commit unlawful acts, and that he conducted himself accordingly with respect to the charged offenses, poses a "'grave danger of prejudice' to [the] accused . . . ." (People v. Thompson (1980) 27 Cal.3d 303, 317.)

This, however, is not the general case. On several occasions and to several persons, defendant confessed that he committed the charged murders. By evidence both physical and testimonial, his confessions were corroborated.

It has been stated that a confession may have an "indelible impact" on the jury, inducing it "to rest its decision on that evidence alone, without . . . consideration of" the rest. (Arizona v. Fulminante (1991) ___ U.S. ___, ___ [111 S.Ct. 1246, 1266] (conc. opn. of Kennedy, J.).)

If even a single confession may have such an "indelible impact," several confessions – as in this case – must practically compel the jury to return a guilty verdict no matter what the other evidence says

or does not say.

Hence, to my mind, the "other crimes" instruction proved to be "unimportant in relation to everything else the jury considered on the issue in question . . . ." (Yates v. Evatt, supra, ___ U.S. at p. ___ [111 S.Ct. at p. 1893].) Therefore, "it appears 'beyond a reasonable doubt that [it] did not contribute to the verdict . . . .'" (Id. at p. ___ [111 S.Ct. at p. 1892].)

Because I have found no prejudicial error or other defect, I concur in the judgment.

MOSK, J.

COPY

PEOPLE v. GARCEAU

S004776 [Crim. 26410]

CONCURRING OPINION BY KENNARD, J.

I concur in the affirmance of the judgment as to both guilt and penalty. I write separately to explain my reasons for concluding that the guilt verdicts should be affirmed even though the trial court erred in instructing the jury that it could consider evidence of the Rambo murder for "any purpose," including defendant's "character or any trait of his character."

In assessing the prejudice to a criminal defendant from an error that permits the jury to consider the defendant's uncharged acts as evidence of character or criminal propensity, this court and the Courts of Appeal have consistently applied the harmless error standard required by our state Constitution (Cal. Const., art. VI, § 13) and articulated in People v. Watson (1956) 46 Cal.2d 818, 836. (See, e.g., People v. Miranda (1987) 44 Cal.3d 57, 83; People v. Alcala (1984) 36 Cal.3d 604, 636; people v. Dominguez (1981) 121 Cal.App.3d 481, 501; People v. Moran (1973) 33 Cal.App.3d 724, 729.) Defendant urges this court to depart from this consistent practice of applying the state harmless error standard and to apply instead the federal standard as described in Chapman v. California (1967) 386 U.S. 18, 24, and further explained in Yates v. Evatt (1991) ___ U.S. ___ [111 S.Ct. 1884].) Defendant maintains that the federal standard is required because the error denied him the due process of law guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

Defendant cites no holding under the federal Constitution prohibiting jury consideration of uncharged crimes to prove criminal propensity. Indeed, the United States Supreme Court just two years ago declined to express an opinion "on whether a state law would violate the Due Process Clause if it permitted the use of 'prior crimes' evidence to show propensity to commit a charged crime." (Estelle v. McGuire

(1991) ___ U.S. ___, ___, fn. 5 [112 S.Ct. 475, 484, fn. 5].) Nevertheless, defendant argues that the instruction in this case denied him due process of law by permitting the jury to consider irrelevant evidence and by lightening the prosecution's burden of proof. I find neither argument sufficiently persuasive to justify use of the federal test, at least until this court receives more explicit guidance from the United State Supreme Court.

Whether an instruction permitting jury consideration of irrelevant evidence would violate a criminal defendant's right of due process under the federal Constitution is at present unclear. (Compare Estelle v. McGuire, supra, ___ U.S. ___, ___ [112 S.Ct. 475, 481] [". . . we need not explore further the apparent assumption of the Court of Appeals that it is a violation of the due process guaranteed by the Fourteenth Amendment for evidence that is not relevant to be received in a criminal trial"] with Barnes v. United States (1973) 412 U.S. 837, 844-845 ["Common-law inferences, like their statutory counterparts, must satisfy due process standards in light of present-day experience."]; see also, People v. Castro (1985) 38 Cal.3d 301, 313 (plur. opn.).) For present purposes, I will assume, without deciding, that the federal Constitutional prohibits any state rule that would permit a criminal conviction to be based in whole or in part on irrelevant considerations.

Even so, defendant's argument is defective because propensity evidence is not, as defendant maintains, irrelevant to guilt in a criminal prosecution. Although courts and commentators have given various explanations for the rule excluding propensity evidence, they agree that the evidence has probative value to establish guilt. (See, e.g., Michelson v. United States (1948) 335 U.S. 469, 476; People v. Smallwood (1986) 42 Cal.3d 415, 428; People v. Alcala, supra, 36 Cal.3d 604, 630-631; People v. Thompson (1980) 27 Cal.3d 303, 317; People v. Schader (1969) 71 Cal.2d 761, 772; IA Wigmore on Evidence (Tillers rev. ed. 1983) § 58.1, p. 1211; 1 McCormick on Evidence (4th ed. 1992) § 190, pp. 797-798.) Because propensity evidence is relevant to guilt, its consideration by the jury cannot violate the federal Constitution's implied proscription (assuming there is one) against jury consideration of irrelevant evidence.

The decisions of the United States Supreme Court do not establish that errors of the kind at issue here – that is, violations of state

rules barring jury consideration of evidence that is relevant but unduly prejudicial – contravene the federal Constitution by lightening the prosecution's burden of proof. It is true of course that any trial error that has any potential for prejudicing the defendant makes conviction marginally more likely and in this sense lightens the prosecution's burden of proof. But it cannot be that every such error thereby becomes one of federal constitutional significance. On the contrary, the United States Supreme Court has, in its own words, "'defined the category of infractions that violate "fundamental fairness" very narrowly.'" (Estelle v. McGuire, supra, ___ U.S. ___ [112 S.Ct. 475, 482], quoting Dowling v. United States (1990) 493 U.S. 342, 352.)

The error here did not influence the jury's understanding of either the elements of the charged offenses or the prosecution's burden of proof. Therefore, I am not persuaded that the error lightened the prosecution's burden of proof in a manner constituting a federal constitutional violation.

Having concluded that the argument for federal constitutional error is insubstantial, I would continue to apply our state harmless error standard, under which a judgment will be reversed for error only when, after an examination of the entire cause including the evidence, the reviewing court is of the opinion that it is reasonably probable that a result more favorable to the defendant would have been reached in the absence of the error. (People v. Watson, supra, 466 Cal.2d 818, 836.) Applying this standard here, I find the error harmless.

The majority reasons that the error was not prejudicial because the prosecution presented "overwhelming evidence establishing defendant's guilt of the charged offenses[.]" (Maj. opn., ante, at p. ___ [typed maj. opn. at p. 60.) But, as defendant points out, the strength of the prosecution's evidence in this case depended upon the credibility of the prosecution's witnesses who testified to defendant's confessions and admissions. Each of these witnesses participated to some extent in the drug operation, and exposure of the drug operation thus threatened each of them, just as it threatened defendant. The charged murders occurred in the apartment of one of these witnesses (Patricia Shepard) and the victims' bodies were buried at the residence of another witness (Susan Rambo). A third witness (Larry Tom Whittington) admittedly participate din moving the bodies and concealing evidence of the

murders. None of the witnesses came forward until long after the murders had occurred, and all had ample time to prepare and coordinate a story placing the blame on defendant. Evidence that depends on the credibility of such witnesses can hardly be deemed overwhelming.

Nevertheless, I am satisfied that defendant was not prejudiced by the court's instruction permitting the jury to consider the Rambo murder as propensity evidence. The instruction could prejudice defendant only if the jury first determined that it was defendant who had killed Rambo, then inferred from this killing that defendant was a violent person capable of murder, and finally used this inference about defendant's character to conclude that defendant committed the charged offenses. But the evidence identifying defendant as Rambo's killer, like the evidence identifying defendant as the perpetrator of the charged murders, consisted primarily of the testimony of other members of the drug ring, with little or no physical evidence tying defendant to the crime. To conclude that defendant had killed Rambo, the jury would have had to find the prosecution's witnesses credible. If the jury believed them as to Rambo's murder, it would almost inevitably believe them as to the charged murders as well.

This analysis is consistent with the defense strategy. The defense recognized that the credibility of the prosecution's witnesses was the key issue – virtually the only issue – in the case. The defense did not oppose admission of the Rambo murder evidence because it viewed that evidence as less credible then the evidence of the charged murders. Thus, the defense was counting on the jury to disbelieve the prosecution's witnesses as to the Rambo murder, and by this means to undermine their credibility as to the charged murders.

Given the nature of the credibility contest presented to the jury, it is highly unlikely that the jury in reaching its guilt verdicts relied to any significant degree on inferences about defendant's character drawn from the Rambo murder. For this reason, it is not reasonably probable that the jury would have returned a verdict more favorable to defendant had the trial court not given the erroneous instruction.

KENNARD, J.

PEOPLE v. ROBERT FREDERICK GARCEAU

S004776

Counsel Who Argued For The Parties

FOR APPELLANT:	Mr. Doran Weinberg Weinberg & Wilder 523 Octavia Street San Francisco, California 94102 (415) 431-3472
FOR RESPONDENT:	Ms. Lisbeth Bellet Office of the Attorney General P.O. Box 944255 Sacramento, California 94244 (916) 324-2898

TRIAL COURT: Kern County Superior Court

TRIAL COURT #: 29601

The information provided here is not intended to reflect that which will appear in official reports.

28 U.S.C.A. § 2241

UNITED STATES CODE ANNOTATED TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE PART VI--PARTICULAR PROCEEDINGS CHAPTER 153--HABEAS CORPUS

Copr. C West Group 2002. No claim to Orig. U.S. Govt. Works.

Current through P.L. 107-185, approved 5-30-02
(except P.L. 107-171)

§ 2241. **Power to grant writ**

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless--

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by

a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

28 U.S.C.A. § 2242

UNITED STATES CODE ANNOTATED TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE PART VI--PARTICULAR PROCEEDINGS CHAPTER 153--HABEAS CORPUS
Copr. C West Group 2002. No claim to Orig. U.S. Govt. Works.
Current through P.L. 107-185, approved 5-30-02
(except P.L. 107-171)

§ 2242. **Application**

Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf. It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known. It may be amended or supplemented as provided in the rules of procedure applicable to civil actions. If addressed to the Supreme Court, a justice thereof or a circuit judge it shall state the reasons for not making application to the district court of the district in which the applicant is held.

28 U.S.C.A. § 2243

UNITED STATES CODE ANNOTATED TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE PART VI--PARTICULAR PROCEEDINGS CHAPTER 153--HABEAS CORPUS
Copr. C West Group 2002. No claim to Orig. U.S. Govt. Works.
Current through P.L. 107-185, approved 5-30-02
(except P.L. 107-171)

§ 2243. **Issuance of writ; return; hearing; decision**

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless

it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

28 U.S.C.A. § 2244

UNITED STATES CODE ANNOTATED TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE PART VI--PARTICULAR PROCEEDINGS CHAPTER 153--HABEAS CORPUS
Copr. C West Group 2002. No claim to Orig. U.S. Govt. Works.
Current through P.L. 107-185, approved 5-30-02
(except P.L. 107-171)

§ 2244. **Finality of determination**

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas

corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be

filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post- conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C.A. § 2245

UNITED STATES CODE ANNOTATED TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE PART VI--PARTICULAR PROCEEDINGS CHAPTER 153--HABEAS CORPUS
Copr. C West Group 2002. No claim to Orig. U.S. Govt. Works.
Current through P.L. 107-185, approved 5-30-02
(except P.L. 107-171)

§ 2245. **Certificate of trial judge admissible in evidence**

On the hearing of an application for a writ of habeas corpus to inquire into the legality of the detention of a person pursuant to a judgment the certificate of the judge who presided at the trial resulting in the judgment, setting forth the facts occurring at the trial, shall be admissible in evidence. Copies of the certificate shall be filed with the court in which the application is pending and in the court in which the trial took place.

28 U.S.C.A. § 2246

UNITED STATES CODE ANNOTATED TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE PART VI--PARTICULAR PROCEEDINGS CHAPTER 153--HABEAS CORPUS
Copr. C West Group 2002. No claim to Orig. U.S. Govt. Works.
Current through P.L. 107-185, approved 5-30-02
(except P.L. 107-171)

§ 2246. **Evidence; depositions; affidavits**

On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.

28 U.S.C.A. § 2247

UNITED STATES CODE ANNOTATED TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE PART VI--PARTICULAR PROCEEDINGS CHAPTER 153--HABEAS CORPUS
Copr. C West Group 2002. No claim to Orig. U.S. Govt. Works.
Current through P.L. 107-185, approved 5-30-02
(except P.L. 107-171)

§ 2247. **Documentary evidence**

On application for a writ of habeas corpus documentary evidence, transcripts of proceedings upon arraignment, plea and sentence and a transcript of the oral testimony introduced on any previous similar application by or in behalf of the same petitioner, shall be admissible in evidence.

28 U.S.C.A. § 2248

UNITED STATES CODE ANNOTATED TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE PART VI--PARTICULAR PROCEEDINGS CHAPTER 153--HABEAS CORPUS
Copr. C West Group 2002. No claim to Orig. U.S. Govt. Works.
Current through P.L. 107-185, approved 5-30-02 (except P.L. 107-171)

§ 2248. **Return or answer; conclusiveness**

The allegations of a return to the writ of habeas corpus or of an answer to an order to show cause in a habeas corpus proceeding, if not traversed, shall be accepted as true except to the extent that the judge finds from the evidence that they are not true.

28 U.S.C.A. § 2249

UNITED STATES CODE ANNOTATED TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE PART VI--PARTICULAR PROCEEDINGS CHAPTER 153--HABEAS CORPUS
Copr. C West Group 2002. No claim to Orig. U.S. Govt. Works.

Current through P.L. 107-185, approved 5-30-02 (except P.L. 107-171)

§ 2249. **Certified copies of indictment, plea and judgment; duty of respondent**

On application for a writ of habeas corpus to inquire into the detention of any person pursuant to a judgment of a court of the United States, the respondent shall promptly file with the court certified copies of the indictment, plea of petitioner and the judgment, or such of them as may be material to the questions raised, if the petitioner fails to attach them to his petition, and same shall be attached to the return to the writ, or to the answer to the order to show cause.

28 U.S.C.A. § 2250

UNITED STATES CODE ANNOTATED TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE PART VI--PARTICULAR PROCEEDINGS CHAPTER 153--HABEAS CORPUS

Copr. C West Group 2002. No claim to Orig. U.S. Govt. Works.
Current through P.L. 107-185, approved 5-30-02 (except P.L. 107-171)

§ 2250. **Indigent petitioner entitled to documents without cost**

If on any application for a writ of habeas corpus an order has been made permitting the petitioner to prosecute the application in forma pauperis, the clerk of any court of the United States shall furnish to the petitioner without cost certified copies of such documents or parts of the record on file in his office as may be required by order of the judge before whom the application is pending.

28 U.S.C.A. § 2251

UNITED STATES CODE ANNOTATED TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE PART VI--PARTICULAR PROCEEDINGS CHAPTER 153--HABEAS CORPUS

Copr. C West Group 2002. No claim to Orig. U.S. Govt. Works.
Current through P.L. 107-185, approved 5-30-02 (except P.L. 107-171)

§ 2251. **Stay of State court proceedings**

A justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.

After the granting of such a stay, any such proceeding in any State court or by or under the authority of any State shall be void. If no stay is granted, any such proceeding shall be as valid as if no habeas corpus proceedings or appeal were pending.

28 U.S.C.A. § 2252

UNITED STATES CODE ANNOTATED TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE PART VI--PARTICULAR PROCEEDINGS CHAPTER 153--HABEAS CORPUS

Copr. C West Group 2002. No claim to Orig. U.S. Govt. Works.
Current through P.L. 107-185, approved 5-30-02 (except P.L. 107-171)

§ 2252. **Notice**

Prior to the hearing of a habeas corpus proceeding in behalf of a person in custody of State officers or by virtue of State laws notice shall be served on the attorney general or other appropriate officer of such State as the justice or judge at the time of issuing the writ shall direct.

28 U.S.C.A. § 2253

UNITED STATES CODE ANNOTATED TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE PART VI--PARTICULAR PROCEEDINGS CHAPTER 153--HABEAS CORPUS

Copr. C West Group 2002. No claim to Orig. U.S. Govt. Works.
Current through P.L. 107-185, approved 5-30-02 (except P.L. 107-171)

§ 2253. **Appeal**

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--
(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C.A. § 2254

UNITED STATES CODE ANNOTATED TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE PART VI--PARTICULAR PROCEEDINGS CHAPTER 153--HABEAS CORPUS

Copr. C West Group 2002. No claim to Orig. U.S. Govt. Works.
Current through P.L. 107-185, approved 5-30-02 (except P.L. 107-171)

§ 2254. **State custody; remedies in Federal courts**

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the
State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State

court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except

as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

28 U.S.C.A. § 2255

UNITED STATES CODE ANNOTATED TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE PART VI--PARTICULAR PROCEEDINGS CHAPTER 153--HABEAS CORPUS

Copr. C West Group 2002. No claim to Orig. U.S. Govt. Works.

Current through P.L. 107-185, approved 5-30-02 (except P.L. 107-171)

§ 2255. **Federal custody; remedies on motion attacking sentence**

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of--

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain--

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.